ENTERED ON DOCKET

DATE

FILED

OCT - 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN ~~DISTRICT OF~~ OKLAHOMA

RALPH COBLENTZ,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 97-CV-820-K(W)
	)	
JEFF HITCHCOCK and JOHN MINES,	)	
	)	
Defendants.	)	

ENTERED ON DOCKET

DATE 10/9/98

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Jeff Hitchcock and John Mines, are hereby dismissed with prejudice.

Ralph Coblentz

RALPH COBLENTZ, PLAINTIFF

By: _____

Lawrence A. G. Johnson,
OBA #4705
2535 East 21st Street
Tulsa, Oklahoma 74114

ATTORNEY FOR PLAINTIFF

CJ

ELLER AND DETRICH
A Professional Corporation

By: _____
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2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEYS FOR DEFENDANTS

3.MAG\coblentz\stipdis

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOUCHSTAR TECHNOLOGIES, L.L.C., a Delaware limited liability company,

Plaintiff,

v.

ELECTRONIC WARFARE ASSOCS., INC., a Virginia corporation,

Defendant.

ENTERED ON DOCKET

DATE 10-8-98

No. 98-CV-319-H ✓

FILED

OCT 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant Electronic Warfare Associates, Inc.'s ("EWA") Motion to Dismiss Complaint, or in the Alternative, to Transfer (Docket # 11). The Court, having considered the record, the parties' arguments and the controlling authorities, finds that the motion to dismiss for lack of personal jurisdiction should be granted.

I

This action involves allegedly defective components of the Fuels Registration and Management System ("F-RAMS") that were designed, developed, tested, and manufactured by EWA. In 1996, EWA sought to develop a commercial relationship with an entity familiar with and able to market the technology incorporated into the F-RAMS systems. To this end, EWA executed a Memorandum of Understanding with Solutions EMT, Inc. ("Solutions"), a Texas corporation. In all respects, and consistent with the intent of the parties, the MOU was an agreement between a Virginia concern and a Texas concern for the sale of a Virginia product to a Texas buyer.

Following its execution, EWA and Solutions began to implement the MOU via a series of

29

purchase orders. All of these purchase orders – like the MOU – were negotiated between EWA's and Solutions' home offices in Virginia and Texas, respectively, and each of these purchase orders specified Georgetown, Texas, as the point of delivery. None of these purchase orders were negotiated with, executed by or provided for shipment to the Plaintiff. With one minor exception addressed below, all of the products shipped in fulfillment of those orders were in fact shipped to Solutions in Georgetown, Texas; the products were inspected and accepted by Solutions in Georgetown, Texas; and Solutions paid EWA from Georgetown, Texas. The products were thereafter integrated into a larger system, which Solutions then sold to Thermogas in Tulsa, Oklahoma.

The only instance in which EWA delivered any F-RAMS components to Oklahoma was in September 1997 when EWA, at Solutions' request, sent twenty reworked subassemblies to the Tom Gorman Company (hereinafter "Gorman"), of Tulsa. Solutions had contracted with Gorman to integrate EWA's F-RAMS into a composite system with equipment supplied by Solutions and third parties. The subassemblies shipped to Gorman had originally been delivered by EWA to Solutions, in Texas, and were returned by Solutions for rework/repair. The subassemblies were, in fact, reworked and, as requested by Solutions, were thereafter shipped to Gorman. Neither Solutions nor Gorman has, at any time, advised EWA that these twenty reworked subassemblies – which were successfully tested prior to shipment – were in any way defective. These subassemblies are not in any way involved in the instant lawsuit.

In addition to the delivery of subassemblies, several times in 1997 and once in 1998 Solutions requested assistance from EWA in connection with problems being experienced by Thermogas, Solutions' client, with F-RAMS systems installed on Thermogas' vehicles. At Solutions' request, EWA asked STA, their software subcontractor, to dispatch service personnel

to Tulsa to assist Thermogas with those problems.

On January 1998, Solutions merged into Touchstar. Thereafter, on January 12, 1998, EWA exercised its right under the MOU to cancel the agreement, though EWA continued to deliver its products to the Georgetown, Texas location. By letter dated January 12, Touchstar voiced concerns to EWA about the continued vitality of the F-RAMS system and requested a meeting in Tulsa with EWA officers. In response to TouchStar's letter of January 12, EWA transmitted a letter to TouchStar's President in Tulsa, Oklahoma and acknowledged that there were "several issues between EWA and TouchStar that need to be discussed, and a meeting is in order." This letter further stated that

> "[a]ll F-RAMS software is the property of EWA and is in EWA's possession . . . . Concern about the possible demise of Systems Technologies Associates ("STA") is quite unfounded, since the relationship between EWA and STA is virtually seamless, and there is no issue whatsoever concerning EWA's commitment to F-RAMS. TouchStar need not be concerned about future support for the various F-RAMS software packages. F-RAMS is one of our major product lines. EWA and STA continue to enhance the software according to our schedule, and we look forward to developing customized software for F-RAMS customers."

EWA's Vice President closed his letter with the suggestion that EWA visit Tulsa to further discuss the business issues regarding the relationship between EWA and TouchStar. Significantly, by letter dated February 3, 1998, Touchstar informed EWA of the Touchstar/Solutions merger and directed that all requests for payment be made to Touchstar's headquarters in Tulsa, Oklahoma.

At TouchStar's insistence, EWA agreed to meet with TouchStar in Tulsa. On February 4, 1998, Dick Friedel (EWA's Vice President) and Gary Ker (EWA's Chief Financial Officer) came to Tulsa, Oklahoma to meet with TouchStar executives to discuss the problems with the

F-RAMS product, potential solutions to the problems, and the nature of the continuing relationship between TouchStar and EWA. The meeting lasted half a day, and resulted in no contracts or other business arrangements involving TouchStar, TouchStar Energy, Thermogas or any Oklahoma-based entities.

On March 17, 1998, Touchstar advised EWA of its disappointment that the F-RAMS system had not met the reliability requirements for marketing, and requested reimbursement of its costs relating to the product. On March 24, 1998, EWA's President, Carl N. Guerreri, wrote Mr. Morelli, TouchStar's President, in Tulsa, Oklahoma. In his letter, Mr. Guerreri demanded payment from TouchStar, stating:

> EWA . . . demands adequate assurance of due performance by TouchStar as successor in interest to Solutions, Inc., i.e., EWA demands that TouchStar assure EWA that it intends to pay EWA the full price for goods delivered and accepted under the Purchase Order and that TouchStar intends to perform any and all future obligations under the Purchase Order . . . . EWA only has a contractual relationship with TouchStar as successor in interest to Solutions, Inc., and EWA intends to hold TouchStar liable for any and all damages that EWA incurs as a result of non-performance of the Purchase Order by TouchStar.

II

Defendant has moved to dismiss Plaintiff's action, claiming that it is not subject to personal jurisdiction in Oklahoma.[1] In this regard:

> [t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits,

[1] The Court applies the law of the forum state, in this case, Oklahoma, to determine whether it has jurisdiction over a nonresident defendant in a lawsuit based on diversity of citizenship. Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Co-op., 17 F.3d 1302, 1304 (10th Cir. 1994); see also Fed. R. Civ. P. 4(e).

> all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (citations omitted). Thus, the Court must "determine whether the plaintiff's allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant." Id.

"The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that '[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.'" Id. at 1416 (citations omitted).

The Rambo court stated that:

> [j]urisdiction over corporations may be either general or specific. Jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum state is "specific jurisdiction." In contrast, when the suit does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum, the court exercises "general jurisdiction."

839 F.2d at 1418 (citations omitted); Doe v. Nat'l Med. Servs., 974 F.2d 143, 145 (10th Cir. 1992) ("Specific jurisdiction may be asserted if the defendant has 'purposefully directed' its activities toward the forum state, and if the lawsuit is based upon injuries which 'arise out of' or 'relate to' the defendant's contacts with the state."). The Supreme Court has explained that:

> [j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern

> commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King, 471 U.S. at 476.

Three criteria guide the Court's determination of whether personal jurisdiction exists: (1) in relation to the plaintiff's claim, the defendants must have purposefully availed themselves of the privilege of conducting activities in Oklahoma, Henson v. Denckla, 357 U.S. 235, 253 (1958); (2) for specific jurisdiction, the cause of action must arise from the defendants' activities in Oklahoma; and (3) the acts or the consequences of the acts of the defendants must have a substantial enough connection with Oklahoma to make the exercise of jurisdiction reasonable, see LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1299 (6th Cir. 1989).

Under the standards set forth above, Plaintiff asserts that jurisdiction over Defendant is proper in Oklahoma. Plaintiff claims that Defendant is subject to specific personal jurisdiction in Oklahoma based on 1) a purported contractual relationship with EWA; 2) EWA's delivery of 20 subassemblies to Tulsa, Oklahoma; 3) communications between EWA and Touchstar's representatives relating to the F-RAMS system; 4) STA's service visits to Oklahoma; and 5) EWA's February 4, 1998 meeting with TouchStar representatives in Tulsa, Oklahoma. In response, Defendant claims that none of its contacts with TouchStar or Oklahoma can be characterized as purposeful availment of the forum for purposes of establishing personal jurisdiction over EWA in this action.

The Court finds that EWA has not purposefully availed itself of the forum such that the maintenance of this action would comport with due process. The record before this Court makes

clear that there was never any contractual relationship between EWA and TouchStar. The products at issue were sold and shipped by EWA and accepted by Solutions in Texas, based on an agreement negotiated by Solutions and purchase orders submitted by Solutions. The products were thereafter integrated into a larger system, which Solutions then sold to Thermogas in Tulsa, Oklahoma. EWA had no contract with Thermogas for the products and had no business dealings with Thermogas of any kind, whether in Oklahoma or elsewhere.

At the hearing and in its papers, Plaintiff asserted that TouchStar's contractual relationship with EWA was based on the TouchStar/Solutions merger. The record, however, contains no evidence that TouchStar became in privity of contract with TouchStar as a result of its acquisition of Solutions. Moreover, though TouchStar relies on EWA's promise to provide technical support as evidence of a contractual relationship between the parties, TouchStar conceded in its brief that EWA's promises of technical support arose from and were directly related to purchase orders submitted by Solutions, not TouchStar. See Plaintiff's Brief in Opposition to Motion of Defendant to Dismiss Complaint at 13. Finally, EWA's demand of performance under the purchase order, on which TouchStar relies to support its assertion of a contractual relationship, was issued only after TouchStar directed that all requests for payment from Solutions should be sent to TouchStar's headquarters in Tulsa, Oklahoma.

The Court further finds that EWA's contacts with the forum, including EWA's communications with TouchStar and the February 4, 1998 meeting with TouchStar representatives in Tulsa, were either initiated by TouchStar or made in response to TouchStar's communications with EWA. Similarly, even if STA's service visits to Thermogas could be viewed as contacts with the forum attributable to EWA by virtue of its relationship to STA, such

visits were simply service calls requested by Solutions in furtherance of Solutions' business relationship with Thermogas. EWA developed no business or contractual relationship with either Thermogas or TouchStar as a result of STA's service visits.

Finally, the Court finds that the delivery of subassemblies to Oklahoma cannot support specific jurisdiction over EWA in this matter. Those subassemblies were not originally delivered to TouchStar and the subsequent delivery of replacement subassemblies was an accommodation to Solutions. Furthermore, as noted above, those subassemblies are in no way related to this litigation.

Based on the above, Defendant Electronic Warfare Associates, Inc.'s Motion to Dismiss Complaint or in the Alternative, to Transfer (Docket # 11) is hereby granted for lack of personal jurisdiction. Accordingly, the Court need not reach Defendant's arguments relating to transfer of the action to the Eastern District of Virginia.

IT IS SO ORDERED.

This 6TH day of October, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY L. LEE and SIMON LEE,)
)
Plaintiffs,)
)
vs.) Case No. 98-C-373-E
)
MARY E. BRADY,)
)
Defendant.)

ORDER

Now before the Court is the Motion To Dismiss (docket #2) of defendant Mary E. Brady.

Plaintiff, Mary Lee, filed suit in this Court, claiming that she was injured to due the negligence of defendant in causing an automobile accident on December 24, 1996 in Cherryvale Kansas. Her husband, Simon Lee, also makes a loss of consortium claim. Plaintiffs allege in their Complaint that they are residents of Oklahoma, that defendant is a resident of Kansas, and that the accident occurred in Kansas. Defendant seeks dismissal of plaintiffs' complaint, arguing that this Court does not have in personam jurisdiction over her and that, pursuant to 28 U.S.C. §1391(a), venue is not proper in the District Court for the Northern District of Oklahoma.

The law of the forum state determines whether a federal court has personal jurisdiction over a nonresident defendant in a diversity action. Rambo v. American Southern Insurance Company, 839 F.2d 1415 (10th Cir. 1988). In Oklahoma, "a court . . . may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States." Okla.Stat.tit.

12, §2004 F, Rambo, 839 F.2d at 1416. In order for the exercise of jurisdiction to be consistent with the Constitution of the United States , the defendant must have "minimum contacts" with the forum state such that the defendant has "purposely availed itself of the privilege of conducting activities within the forum state." Rambo, 839 F.2d at 1417. In this case, there is no allegation in the Complaint that would support this requirement. It is simply alleged that defendant is a defendant of Kansas and that the accident took place in Kansas.

Defendant's Motion to Dismiss (Docket # 2) is granted.

IT IS SO ORDERED THIS 6TH DAY OF OCTOBER, 1998.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARY BIG ELK and RAYMOND POLLARD, AKA SAM McCLANE

PLAINTIFFS,

V.

DONNA KASTNING, individually and in her official capacity as the Deputy Sheriff for Osage County, Oklahoma; and DAN HIVELY, individually and in his official capacity as a Deputy Sheriff for Osage County, Oklahoma; and WES PENLAND, individually and in his official capacity as Lieutenant and Undersheriff for Osage County, Oklahoma; and RUSSELL L. COTTLE, in his official capacity only as Sheriff of Osage County and as a policymaker on behalf of the Board of County Commissioners of the County of Osage; and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OSAGE, a Subdivision of the State of Oklahoma.

DEFENDANTS.

CASE NO. 96-CV-0087-B

JUDGMENT

This action came on for jury trial before the Court, Honorable Thomas R. Brett, District Judge presiding, and the issues having been duly tried and a decision rendered by the jury,

IT IS ORDERED AND ADJUDGED that the Plaintiff, MARY BIG ELK, recover of the Defendants, DONNA KASTNING and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OSAGE, the sum of $20,325 in actual damages, with interest thereon at the statutory rate of 4.730% from the date hereon and costs of the action if timely applied for under N.D.LR 54.1.

IT IS FURTHER ORDERED that the Plaintiff, MARY BIG ELK, recover of the Defendant, DONNA KASTNING, the sum of $5,000.00 in punitive damages, with interest thereon at the statutory rate of 4.730% from the date hereon and costs of the action if timely applied for under N.D.LR 54.1.

IT IS FURTHER ORDERED that the Plaintiff, RAYMOND POLLARD AKA SAM MCCLAIN, recover of the Defendants, DONNA KASTNING and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OSAGE, the sum of $5,000 in actual damages with interest thereon at the statutory rate of 4.730% from the date hereon and costs of the action if timely applied for under N.D.LR 54.1.

IT IS FURTHER ORDERED that the Plaintiff, RAYMOND POLLARD AKA SAM MCCLAIN, recover of the Defendant, DONNA KASTNING, the sum of $5,000.00 in punitive damages with interest thereon at the statutory rate of 4.730% from the date hereon and costs of the action if timely applied for under N.D.LR 54.1.

IT IS FURTHER ORDERED that the Plaintiffs, Mary Big Elk and RAYMOND POLLARD AKA SAM MCCLAIN, take nothing from the Defendants, DAN HIVELY and WES PENLAND, that the action be dismissed on the merits as to these named Defendants, and that these named Defendants recover of the Plaintiffs their costs of action (without attorneys fees) if timely applied for under N.D.LR. 54.1.

IT IS FURTHER ORDERED that Plaintiffs recover attorneys fees as prevailing parties against Defendants DONNA KASTNING and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OSAGE, if timely applied for under N.D.LR. 54.2.

DATED AT TULSA, OKLAHOMA this 7th day of October, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: RASKIN RESOURCES, INC., Plaintiff, ROCKWELL INTERNATIONAL COPORATION, a Delaware corporation consolidated Plaintiff v. ROCKWELL INTERNATIONAL CORPORATION, a Delaware Corporation, Defendant HOWARD RASKIN, PHYLLIS M. RASKIN, DEBORAH RASKIN, GREGORY A. RASKIN, ROBERT H. RASKIN, consolidated Defendant	Case No. 94-CV-452 -H

FILED
OCT - 7 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE 10/8/98

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Raskin Resources, Inc., Debtor, and the consolidated Plaintiff and the Defendant, Rockwell International, and hereby submit their Stipulation of Dismissal With Prejudice of any and all claims against each other, with prejudice to refiling.

Pat Malloy, III, Trustee, on behalf of Raskin Resources, Inc., Debtor and Plaintiff.

Boeing North American, Inc., formerly known as Rockwell International,
by: _____

CERTIFICATE OF MAILING

This is to certify that a true, correct and exact copy of the above and foregoing instrument has been mailed to :

Patrick J. Malloy III, Trustee
1924 S. Utica, Ste 810
Tulsa, OK 74104

J. Schaad Titus
500 ONEOK Plaza
100 W. Fifth Street
Tulsa, OK 74103

Howard Raskin, President
Raskin Resources, Inc.
6804 S. Canton, Ste 800
Tulsa, OK 74170

Carol Wood English
15 W. Sixth Street, Ste 1610
Tulsa, OK 74119-5466

Katherine Vance
Assistant U. S. Trustee
224 S. Boulder, Ste 225
Tulsa, OK 74103

Neal Tomlins
2642 E. 21st Street, Ste. 230
Tulsa, OK 74114

C. Rabon Martin
403 S. Cheyenne
The Martindale Penthouse
Tulsa, OK 74103

Gary L. Richardson
Autumn Oaks Bldg
6846 S. Canton, Ste 200
Tulsa, OK 74136-3414

Tilly & Associates
James W. Tilly
PO Box 3645
Tulsa, OK 74101-3645

this 7th day of October, 1998 with proper postage thereon fully prepaid.

Alan W. Gentges

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 07 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELISSA A. TAICLET,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

No. 98-CV-399-M

ENTERED ON DOCKET
DATE OCT 08 1998

ADMINSTRATIVE CLOSING ORDER

This case was remanded to the Commissioner of Social Security (Commissioner) under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 7th day of Oct., 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(7)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MELISSA A. TAICLET,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 98-CV-399-M**
	)	
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	
	)	
Defendant.	)	
	)	

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

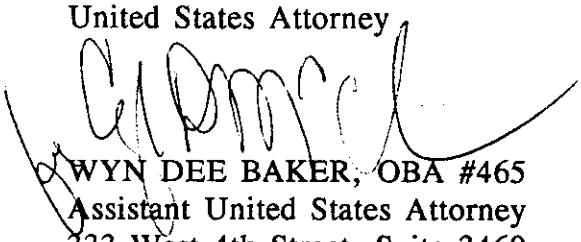
DATED this ____ day of October 1998.

S/Frank H. McCarthy
U.S. Magistrate

FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAMONA L. GRAY, *ex rel.*
CHRISTOPHER GRAY, a minor,
SS# 549-83-3455

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-780-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 7th day of October 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(14)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAMONA L. GRAY, *ex rel.*
CHRISTOPHER GRAY, a minor,
SS# 549-83-3455

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

FILED
OCT - 7 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-780-J

ENTERED ON DOCKET
DATE OCT 08 1998

ORDER[2/]

Plaintiff, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because Plaintiff is disabled due to Plaintiff's attention deficit hyperactivity disorder. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision for further proceedings consistent with the Order of the Court.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge Leslie S. Hauger, Jr. (hereafter "ALJ") concluded that Plaintiff was not disabled on May 15, 1996. [R. at 9]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 20, 1997. [R. at 3].

(13)

I. PLAINTIFF'S BACKGROUND

Plaintiff was eleven years old at the time of the hearing before the ALJ. [R. at 110]. In his brief, although Plaintiff acknowledges the intervening change in law, Plaintiff asserts that the ALJ erred in concluding that Plaintiff was not disabled under the former law. As noted below, the prior law does not apply to this appeal, and the Court will decide this action based on the current law.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The statutes and regulations in effect at the time of the ALJ's decision required application of a four-step evaluation process. See 42 U.S.C. § 1382c(a)(3)(A)(1994); 20 C.F.R. § 416.924(b)(1994).

After the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act. Pub. L. No. 104-193, 110 Stat. 2105. This Act amended the substantive standards for the evaluation of children's disability claims. The statute currently reads:

> An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual had a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 1382c(a)(3)(C)(i). The notes following the Act provide that this new standard for the evaluation of children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act (August 22, 1996). This includes cases in which a request for judicial review is pending.

Consequently, this new standard applies to the Plaintiff's case. See also Gertrude Brown for Khilarney Wallace v. Callahan, 120 F.3d 1133 (10th Cir. 1997) (applying new standards to a children's disability appeal).

The regulations which implement the Act provide:

> (d) *Your impairment(s) must meet, medically equal, or functionally equal in severity a listed impairment in appendix 1.*
> An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.
>
> > (1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.
> > (2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.

20 C.F.R. § 416.924. Consequently, based on the applicable statutes and regulations, Plaintiff is disabled only if Plaintiff can establish that she meets a Listing.[4/] See also Brown, 120 F.3d 1133 at 1135 ("In reviewing the Commissioner's decision, therefore, we do not concern ourselves with his findings at step four of the analysis; we ask only

---

[4/] At step three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, commonly referred to as the "Listings." An individual who meets or equals a Listing is presumed disabled.

whether his findings concerning the first three steps are supported by substantial evidence.").

III. THE ALJ'S DECISION

The ALJ denied benefits at Step Four. The ALJ, in his findings, states only that Plaintiff's impairment did not meet or equal a Listing. [R. at 16].

IV. REVIEW

When the ALJ held a hearing on this case and subsequently wrote his opinion, the applicable law was different than the current law. The problem created in this case is a result of the intervening change in the law. Due to the new statutes, children are considered disabled only if they meet or equal a "Listing." However, because the applicable law at the time of his decision was different, the ALJ did not discuss the Listings, in any detail, in his Order.

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equaled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51. Furthermore, in his decision, the ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).

As noted above, in this case, the ALJ merely stated that based on a review of the evidence, the claimant did not meet a Listing. This type of procedure is exactly

what the Court of Appeals for the Tenth Circuit was critical of in Clifton. In Clifton the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at step three, or even identify the relevant Listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. As in Clifton, the ALJ in this case did not discuss the medical evidence in connection with his step three conclusion, and did not identify any potentially applicable Listings. In Clifton, the Tenth Circuit held that this type of a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

The Tenth Circuit held as follows:

> Under the Social Security Act,
>
> > [t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.
>
> 42 U.S.C. 405(b)(1). . . .
>
> This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her

> factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .
>
> In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

The Court believes that the change in the applicable law during the time period between the decision of the ALJ and the decision of this Court is responsible for the situation presented in this case. However, because no specific findings were made by the ALJ at Step Three, this Court is unable to review the Step Three decision and determine whether or not it was supported by substantial evidence.

Defendant argues that Plaintiff has waived the right to assert that Plaintiff meets a Listing. However, Plaintiff's brief demonstrates that Plaintiff misunderstood the applicable law. The Court concludes that this does not constitute an intentional waiver. Regardless, the Court cannot uphold a decision of the Commissioner which is not supported by appropriate factual findings. Because the ALJ did not explain his

decision at Step Three, the Court concludes that the decision is not supported by substantial evidence.

The Court wishes to make clear that it is in no way expressing an opinion as to whether Plaintiff actually meets or equals a Listing. However, this Court lacks the authority to make such findings. Rather, this Court is limited to reviewing the findings made by the ALJ and the Commissioner and determining if those findings are supported by substantial evidence. Consequently, the Court is simply remanding this case to permit the ALJ an opportunity to discuss his conclusions in connection with any applicable Listings. Only then can this Court review the ALJ's decision in connection with the Listing(s).

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

Dated this 7 day of October 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY, Plaintiffs, vs. BILL McCALISTER and DEBBIE McCALISTER, Defendants.	Case No. 96 C-892 C (Consolidated)
BILL McCALISTER, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign insurance company, and STATE FARM FIRE AND CASUALTY COMPANY, a foreign insurance company, Defendants.	Case No. 96 C-1147 C

ORDER

THIS MATTER comes before the Court on the Joint Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

SO ORDERED this 7th day of ~~September~~ oct., 1998.

U.S. DISTRICT JUDGE

93/21

JAG:pm/9/30/98/5273.96

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

WARREN F. KRUGER, an individual, and JULIE S. KRUGER, an individual,

Plaintiffs,

vs.

WILLIAM O. INMAN, III, d/b/a THE INMAN COMPANY,

Defendant.

Case No. 98-CV-153-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 6th day of ~~September~~ October, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(21)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT - 6 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILMA K. UNDERWOOD,

Plaintiff,

vs.

CUSTODIS-ECODYNE, INC.,
A Delaware corporation,

Defendant.

Case No. 97 CV-707-BK (J)

ENTERED ON DOCKET
DATE OCT 07 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, Plaintiff Wilma K. Underwood and Defendant Custodis-Ecodyne, Inc. hereby dismiss the above lawsuit with prejudice.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVA L. MOODY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 97-CV-079-K**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Defendant's, the United States of America, Motion for Summary Judgment. The Plaintiff, Eva L. Moody, brings this suit for the refund of taxes wrongfully collected by the United States. The Defendant alleges that the Plaintiff has failed to meet her burden of producing a genuine issue of fact for trial, and asks this Court to grant summary judgment as to Plaintiff's remaining claim.

I. Litigation History

The Plaintiff, Eva Moody, filed a complaint on January 27, 1997 against the Internal Revenue Service ("IRS") alleging a series of violations by that agency. All but one of those claims were resolved in an Order by Chief Judge Terry C. Kern entered on August 27, 1997. Pursuant to that Order, the Court held that Plaintiff's only remaining claim was for a tax refund, and that claim would be allowed subject to the condition that it applies only to those amounts which have been paid in excess of that statutorily owed, and for which a refund has been sought. The Court determined that, as to all other assessments, Plaintiff had failed to state a cause of action. Pursuant to this Order, the Plaintiff filed an

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Amended Complaint on September 15, 1997, and the Defendant filed this Motion for Summary Judgment that is now before the Court.

I. Statement of Facts[1]

Plaintiff was assessed a trust fund recovery penalty pursuant to 26 U.S.C. Section 6672 in the amount of $131,753.60 relating to an Oklahoma Corporation, Aviation Resources, Inc., (now known under the name "BTS") for the period ending December 31, 1992. The Internal Revenue Service ("IRS") filed a notice of federal tax lien against Plaintiff in Tulsa County, Oklahoma on May 15, 1996.

The Plaintiff filed an Amended Complaint in which she alleges that the Internal Revenue Service is barred from collecting the trust fund recovery penalty assessed against her for the period ending December 31, 1992, pursuant to the terms of an agreement dated October 28, 1993 between BTS and the IRS. This agreement was extended on April 28, 1994, and again on November 7, 1994.

Pursuant to this agreement, BTS was to make monthly payments of $20,000 from October, 1993, through January 1994, and pay the balance of certain delinquent tax liabilities on or before March 1, 1994. The IRS agreed not to assess the trust fund recovery penalty against Plaintiff while BTS complied with the agreement. The Defendant alleges that BTS failed to perform with the terms of the agreement, and an extension for payment in full was granted. The Defendant claims that BTS, again, failed to abide by the terms of the agreement, and did not pay the balance in full by the extended date of November 5, 1994. BTS and the IRS again entered into an agreement for payment in full of the trust

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[1]The facts in this case, involving the collection of taxes by the IRS, are complicated, in dispute, and involve a series of events going back over a year. Because all of Plaintiff's claims, save this one, are no longer viable, this Court will present the facts relevant to the existing issue as laid out in Plaintiff's Amended Complaint.

fund recovery penalty, but BTS failed to pay the balance in full, and Defendant alleges that BTS has not made a payment since April of 1995. The Defendant alleges there is an outstanding balance on the trust fund portion of BTS' employment tax liability which amounts to $89,672.90, with interest continuing to accrue, as of September 24, 1997.

The Plaintiff contends that the Installment Agreement struck between BTS and the IRS was intentionally drafted with 6-month terms because the agreement was unsecured and no liens were filed. Thus, the Plaintiff alleges that BTS did not fail to perform, but that the agreements were intended to be renewable. The Plaintiff alleges, furthermore, that the Defendant breached the terms of the Installment Agreement. Because of this breach, BTS directed the Government through a letter on August 3, 1994, to apply all future payments made by BTS to the Trust Fund obligation. The Plaintiff contends that the accounting provided by the Defendant, which the Plaintiff just recently received, indicates that there are five misapplied payments of $20,000 each, and one of $13,265.20 between November 10, 1994 and April 10, 1995, making a total of $113,265.20 in misapplied payments. The Plaintiff claims that the Trust Fund amount outstanding on January 18, 1995[2] was fully extinguished on March 6, 1995 through the payments made by BTS and that Plaintiff owes no debt.

The Plaintiff contends that the Defendant is only allowed by statute to claim from Plaintiff, by way of a penalty, an amount up to 100% of the Trust Fund amount, but not the BTS portion, penalties or interest. The Plaintiff asserts that she cannot be assessed a penalty for the full amount of the BTS obligation by law, and, in any case, the amount of the misapplied payments above is more than

---

[2]The amount of the outstanding Trust Fund amount on January 18, 1995 is in dispute, with the Plaintiff contending the amount equaled $35,409.21, while the Defendant contends the outstanding balance owed is $89,672.90.

sufficient to fully retire the alleged total outstanding balance of BTS if applied in accordance with BTS' designation as required by statute.

Finally, the Defendant alleges that the Plaintiff has not sought a refund with the IRS for the amount seized and for an abatement of the assessment of the trust fund recovery penalty. The Defendant notes that the Plaintiff has attached a copy of the alleged refund claim to her Amended Complaint but it is not file-stamped by the IRS, nor is there any indication on the document that it was filed by the IRS. The IRS has searched AWCS for refund claims that have been processed by the Special Procedures Branch of the Arkansas-Oklahoma District of the IRS from January, 1995, through January, 1997, and has found no indication that Plaintiff filed the claim for refund nor any other refund for a trust fund recovery penalty. The Plaintiff asserts that the Defendant is erroneous in this conclusion, and that the Plaintiff has filed five such refund forms, which were mailed to the IRS center in Memphis, Tennessee. Plaintiff admits that there has been no response to these refund requests, and states that Defendant has failed to find the forms, because they have checked the files in the Arkansas-Oklahoma Center, and not the Memphis center.

II. Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). W here the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific

facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. Thomas v. Internat'l Business Machines, 48 F.3d 478, 485 (10th Cir. 1995).

III. Discussion

The Defendants are seeking Summary Judgment on Plaintiff's remaining claim, on the grounds that Plaintiff has failed to produce a genuine issue of material fact for trial. As indicated, almost every relevant fact at issue in this case is in dispute, and the accounts of the circumstances between the parties are vastly different. The one material fact which is not in dispute, however, is dispositive in this case. Per Order entered by Chief Judge Terry Kern on August 27, 1997, the Court held: "Plaintiff's only remaining claim is a claim for a tax refund...This claim is allowed subject to the condition that it applies only to those amounts which have been paid in excess of that statutorily owed, ***and for which a refund has been sought.***" (Emphasis added). This Court finds that the Plaintiff has failed to meet her burden on summary judgment of creating a genuine issue of material fact for trial.

The summary judgment standard is clear and unambiguous. In order to survive summary judgment, the non-moving party must demonstrate that there exists a genuine issue of material fact for trial. Furthermore, the Order from this Court clarified Plaintiff's burden, and, in fact, laid out specifically what she must show to maintain her only surviving cause of action. In order to maintain a cause of action for a refund from the IRS, the Plaintiff was obligated to show that there was a refund warranted under the statute, and that the Plaintiff had sought a refund for that amount. The Plaintiff

has failed to meet that burden. While the Plaintiff alleges that the refund forms were filed, she has provided no evidence of those refund requests. In fact, the refund request form that Plaintiff attaches to her Amended Complaint does not contain the address to which it was sent, and is not file-stamped received. As to the other refund requests that Plaintiff alleges were filed, she provides the Court with the dates on which they were mailed, but gives absolutely no evidence for their existence.

The Defendant addresses this issue in the Motion for Summary Judgment, stating that they have searched the data base and have found no record of any refund filed by the Plaintiff. The Plaintiff has responded to this by "suggest[ing] that Defendant check its records at its Memphis center and not the Arkansas-Oklahoma center." Plaintiff also states that, "...most if not all of these claims were sent by certified mail and [the Plaintiff] believes that the evidence of receipt could be located and furnished." This Court agrees that if the refund requests were indeed filed, they could be "located and furnished." Nevertheless, the Court explicitly informed the Plaintiff that this burden belonged to her, and she has nevertheless failed to meet that burden. She has not indicated that any effort has been made, on her own, to locate these documents. She has not provided copies of the documents that indicate, in any way, that they were actually mailed and received. She has not provided the Court with evidence that they were sent by certified mail. She has not alleged that she has attempted to contact the Memphis agency, and she has provided no documentation of their response, or lack thereof. She merely "reiterate[s] that the claims were made to the Memphis IRS center and not the Arkansas-Oklahoma center."

As discussed *supra*, this case was filed by the Plaintiff over a year and nine months ago. Since the Order entered on August 27, 1997, the Plaintiff has filed not one bit of evidence with this Court to show that she did, indeed, file refund requests to the Memphis office or otherwise. Despite this Court's

explicit advisement to Plaintiff as to what steps must be taken in order to sustain her only surviving claim in this action, she has still failed to meet that burden.

While there are many facts in dispute in this case, the minimum requirement necessary to withstand summary judgment by the Plaintiff has clearly not been satisfied. Absent evidence that Plaintiff did request a refund, she cannot succeed in this action as a matter of law. We find that summary judgment must be granted.

IV. Conclusion

For the foregoing reasons, the Defendant's Motion for Summary Judgment is GRANTED. The Defendant, the United States, is further ordered to provide this Court with a complete calculation, culminating on the date of this Order, of the amount owed by the Plaintiff, Eva L. Moody, in order that a Judgment might be entered against her.

ORDERED this 30 day of September, 1998.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHELL OIL COMPANY,

Plaintiffs,

vs.

BRUCE BABBITT, SECRETARY, DEPARTMENT OF THE INTERIOR, et al,

Defendants.

No. 96-C-1078-K

ENTERED ON DOCKET
DATE 10-7-98

FILED

Phil Lombardi, Clerk

JUDGMENT

This matter came before the Court for consideration of the Plaintiff's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendants.

ORDERED this 5 day of October, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 10-7-98

SHELL OIL COMPANY,

Plaintiff,

vs.

BRUCE BABBITT, SECRETARY, DEPARTMENT OF THE INTERIOR, et al,

Defendants.

No. 96-C-1078-K

FILED

O R D E R

Before the Court are the cross-motions of the parties for summary judgment. Plaintiff brings this action seeking a declaratory judgment that an "Order to Pay" issued to plaintiff by the Minerals Management Service (MMS) is invalid or otherwise barred, and seeking injunctive relief against enforcement of that order. The parties previously agreed that the Court could, under the traditional "futility exception" to the requirement of exhaustion of remedies, address plaintiff's assertion of a statute of limitations bar.

Plaintiff Shell Oil Company ("Shell") is a purchaser of crude oil from federal oil and gas leases onshore and offshore California on leases issued under the Mineral Leasing Act, 30 U.S.C. §§ 181-287 and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356. Shell's affiliate, Shell Western E & P Inc., was the lessee during most of the period in question, 1980-1988.

The Secretary of the Interior administers these leases and has

authority to determine royalty value under these acts and the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. §§ 1701-1757. The MMS is the agency of the Department of the Interior (DOI) responsible for determining royalty value and collecting royalties due on federal and Indian oil and gas leases.

Plaintiff alleges that on October 18, 1996, the MMS issued to Shell an Order to Pay additional royalties in the amount of $22,729,477.17, plus interest. The Order states that it covers the period October 1, 1983 through February 29, 1988.

Plaintiff argues that the Order to Pay issued it is barred by operation of the six-year statute of limitations in 28 U.S.C. §2415(a). Section 2415 states in pertinent part as follows:

> Subject to the provisions of section 2416 of this title. . . every action for money damages brought by the United States . . . or [an] agency thereof which is founded upon any contract . . . shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

The government denies that this provision is applicable to MMS royalty orders. This Court's analysis must proceed in stages, because all parties have discussed at length a potentially controlling Tenth Circuit decision, Phillips Petroleum v. Lujan, 4 F.3d 858 (10th Cir.1993). A district court must follow the precedent of its circuit, regardless of its own views as to that precedent's correctness. See United States v. Spedalieri, 910 F.2d 707, 709 n.2 (10th Cir.1990). Therefore, if this Court concludes that the Tenth Circuit has addressed the pending issue as a matter of precedent, this Court's task is at an end.

The plaintiff argues that the Tenth Circuit has indeed issued a binding ruling upon the issue of §2415(a) and collection of royalty payments. The government replies that the statements in the Phillips opinion constitute dicta, and that the issue remains open for this Court's independent analysis. The court in Phillips begins by stating that the "central issue" before it is at what point the statute of limitations should commence to run "in an action to recover underpaid royalties from an oil and gas lease." 4 F.3d at 859. The appeal involved litigation of a suit against the government to enjoin it from enforcing an Order to Pay, as in the case at bar. In initiating its analysis, the court noted that "[t]he parties agree that 28 U.S.C. §2415(a) is the applicable statute for determining when the government must commence its action to collect the royalty underpayment." Id. at 860. From that premise, the Tenth Circuit continued its discussion, ultimately reversing the district court on grounds not applicable here.[1]

The government argues that the Phillips court merely referred to the fact of the parties' agreement as to the applicability of §2415(a), and did not make an independent finding on the point. This Court disagrees. First, it is established that a court is not bound by the parties' stipulations regarding questions of law. See Koch v. United States, 47 F.3d 1015, 1018 (10th Cir.), cert. denied,

[1]The government has expressly disavowed that its Orders meet the one-year savings clause of §2415(a) or that the statute of limitations at §2415(a) has been tolled in this case pursuant to 28 U.S.C. §2416(c).

516 U.S. 915 (1995). An "independent evaluation" must be made of a legal principle necessary for decision. Moreover, the Phillips court did so explicitly. In a footnote, the court stated "[b]oth parties recognize, and we agree, that oil and gas leases are contracts. Thus, we likewise agree with the parties that 28 U.S.C. §2415(a) is the controlling statute of limitations" relating to the government's collection of royalty underpayments. 4 F.3d at 860 n.1 (emphasis added)(citations omitted).

The government further argues that because of the parties' agreement on the point in Phillips, the issue was not sufficiently "contested" to render the Tenth Circuit's discussion binding. If this principle were adopted, any and all rulings on a point of law raised by a court sua sponte would be properly characterized as dicta. This Court does not accept the principle.

"Dicta are `statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'" Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1184 (10th Cir.1995)(quoting Black's Law Dictionary 454 (6th ed. 1990)). This Court finds that the language of the Phillips decision holding §2415(a) applicable to Orders to Pay was necessary and essential to the decision. A separate holding of the decision establishes when the government's right of action accrues on royalty claims for purposes of §2415(a). 4 F.3d at 861. It is, as a matter of logic, essential to the holding concerning accrual of a claim under §2415(a) that §2415(a) applies in the first place. Accordingly, this Court characterizes

the discussion in Phillips of a six-year statute of limitation as binding Tenth Circuit authority, rather than dicta.

Having reached this conclusion, this Court need not and will not engage in any discussion of conflicting authority from other jurisdictions cited by the government.[2] Only the Tenth Circuit itself or the United States Supreme Court may modify or overrule Tenth Circuit precedent.

The Court declines to address the plaintiff's alternative argument, that even if §2145(a) does not apply, the issuance of the Order to Pay is arbitrary and capricious because it violates the general "timeliness" requirement imposed on the Secretary by 30 U.S.C. §1711(a). First, reaching the issue is unnecessary to a decision, the Court having already ruled that §2145(a) does apply. Second, it appears to be outside the stipulation of the parties when they agreed that the Court could address the statute of limitations issue rather than require plaintiff to pursue futile administrative remedies. In agreeing that the Court could retain jurisdiction over Count IV of plaintiff's complaint, the government stated "[t]he only issue before the Court would then be the narrow one of whether 28 U.S.C. §2415(a) bars MMS's orders to pay." (Defendants' reply brief of May 2, 1997 at 6). The Court has found that the defendants' Orders to Pay are time-barred under the statute and may not be pursued. Having addressed this narrow issue, the Court elects to proceed no further.

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[2]This authority is from the district court level, with the exception of an unpublished Fifth Circuit opinion.

In its previous order, the Court also retained jurisdiction over any claim for attorney fees which plaintiff might wish to pursue. Such a motion may be filed in accordance with the Local Rules.

It is the Order of the Court that the motion of the plaintiff for summary judgment (#21) is hereby GRANTED and the motion of the defendants for summary judgment (#29) is hereby DENIED. All other motions are DENIED as moot.

ORDERED this 5 day of October, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES C. LONG,

Plaintiff,

v.

MEAD CORPORATION,

Defendant.

ENTERED ON DOCKET
DATE 10-7-98

No. 98-CV-0264H (E)

STIPULATION OF JOINT DISMISSAL WITHOUT PREJUDICE

Plaintiff James C. Long and Defendant Mead Corporation, pursuant to Federal Rule of Civil Procedure 41(a), (c), stipulate and agree to the dismissal without prejudice of their respective claims. Each party shall bear its own costs, expenses, and attorney fees.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTERFAB, LTD.,

Plaintiff,

vs.

VALIANT INDUSTRIER A/S, and PHILLIPS PETROLEUM COMPANY NORWAY,

Defendant.

No.98-CV-204-C (E)

ORDER

Currently pending before the Court are motions filed by defendants Valiant Industrier A/S and Phillips Petroleum Company Norway seeking dismissal of plaintiff Interfab, Ltd.'s complaint on jurisdictional grounds. Alternatively, defendants urge the Court to apply the doctrine of forum non conveniens and decline jurisdiction.

Valiant Industrier A/S ("Valiant") is a Norwegian company that is registered, organized, and existing under the laws of Norway.[1] Its sole office is located in Stavanger, Norway. Valiant is owned by Norwegian citizens and is not licensed to do business in the United States, nor does it maintain a place of business in the United States. Phillips Petroleum Company Norway ("Phillips Norway") is incorporated in Delaware, and its principal office and base of operation is located in Norway. Phillips Norway is a wholly owned subsidiary of Phillips Petroleum Company which is incorporated under the laws of Delaware and has its principal place of business in Bartlesville, Oklahoma. Interfab, Ltd. ("Interfab") is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma.

This diversity action arises out of a business arrangement between Interfab and Valiant.

[1] Prior to January 1, 1998 Valiant was know as Sylvester Industrier A/S.

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Under this agreement, Valiant was to provide certain oil field equipment to Interfab for resale to third parties. The equipment in question was sold to Valiant by Phillips Norway pursuant to a sales agreement which became effective May 15, 1997. However, Valiant was already attempting to sell the equipment prior to the effective date. All of the equipment was located in Norway. Mr. Bill Schluneger of Interfab was in Norway on unrelated business when he was informed of the availability of the equipment by a third party and consequently sought a meeting with Valiant in an attempt to purchase the equipment. Representatives of Valiant showed the aforementioned oil drilling equipment, which it claimed to own, to Schluneger on April 10-11, 1997. After viewing the equipment with Mr. Trond Melhus of Valiant, Schluneger discussed the possibilities of Interfab purchasing the equipment, but no contract was entered into at that time.

From the pleadings and affidavits submitted to the Court, it appears that the first Interfab-Valiant transaction of sale occurred in mid-April 1997 and was unrelated to the case at bar. Valiant faxed a list of nine "elevators" to Interfab, and Interfab offered to purchase the "elevators" for $350,000. Valiant accepted the offer and invoiced Interfab for said amount on April 24, 1997. The parties continued dealing and in late-April 1997, Valiant offered to sell Interfab a "Continental Emsco Table" for $55,000. This transaction is also unrelated to the present action, and the pleadings do not indicate whether this sale ever took place.

On June 16, 1997, the first formal transaction of the contract which gives rise to this action was undertaken. Interfab offered Valiant $2.5 million for six refurbished "drilling packages, less derricks and subs" via facsimile. On June 24, 1997, Melhus traveled to Tulsa in order to sign the Interfab-Valiant sales agreement. Under the terms of the contract, Interfab was to pay $2,527,000 with 10% to be paid to Valiant upon execution of the agreement. Performance was to occur in

Norway. The contract called for delivery to be made to Stavanger, Norway and provided for piecemeal delivery with payments to be made correspondingly; delivery was to be completed by September 1, 1997. However, the contract did not contain a choice of law or forum clause.

Apparently, at least one delivery was made, and although there is a dispute as to which party breached first, Interfab argues that the equipment was not refurbished and that Valiant failed to provide complete equipment and spare parts which were necessary for resale. Valiant, on the other hand, alleges that Interfab breached the contract. In any event, the identity of the breaching party is not material to the Court's present inquiry. A fact of import is that Melhus again traveled to Tulsa in August 1997 in an attempt to reconcile the matter. He assured Interfab that the deficiencies would be corrected and expressed a desire that the contract remain in effect. The difficulties continued, however, and in September 1997, Schluneger and Interfab's counsel, Mr. Robert Green, traveled to Norway in an attempt to settle the dispute. The negotiations were fruitless, the relationship between Interfab and Valiant broke down, and the equipment continues to be stored in Norway.

As a preliminary matter, the Court denied Valiant's motion for dismissal, which complained of defective service, in an Order issued on August 4, 1998. The Court, however, reserved judgment at that time on Phillips Norway's claims and Valiant's remaining claims which follow. Valiant seeks a dismissal on the grounds that its contacts with Oklahoma are so minimal as to deprive this Court of personal jurisdiction. In the event that the Court finds that it does have jurisdiction, Valiant contends that dismissal is nevertheless warranted under the doctrine of forum non conveniens. Phillips Norway likewise seeks a dismissal under the doctrine of forum non conveniens.

In response, Interfab argues that Valiant's contacts with the forum are sufficient to provide the Court with personal jurisdiction over Valiant. Interfab primarily asserts that this Court has

jurisdiction due to the fact that Melhus, as an agent of Valiant, came to Tulsa to execute the contract, which is the basis of this suit, and that he subsequently returned to Tulsa when disputes pertaining to the contract arose, in an attempt to placate Interfab and urge affirmation of the contract. Interfab further argues that the Court should exercise jurisdiction and deny defendants' request for dismissal on the grounds of forum non conveniens.

Turning to the issue of personal jurisdiction, the standard governing motions seeking to dismiss an action on personal jurisdictional grounds is well-settled in this Circuit:

> The plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Behagen v. Amateur Basketball Ass'n of the United States, 744 F.2d 731, 733 (10th Cir. 1984).

"Whether a federal court has personal jurisdiction over a nonresident defendant in a diversity action is determined by the law of the forum state," Yarbrough v. Elmer Bunker & Assocs., 669 F.2d 614, 616 (10th Cir. 1982), and the "Due Process Clause . . . operates to limit the power of a State to assert in personam jurisdiction over a nonresident defendant." Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408, 413-14 (1984). The test for exercising jurisdiction under a long-arm statute is two-fold: first the Court must determine whether jurisdiction is authorized by statute, and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of Due Process. Yarbrough, 669 F.2d at 616. In Oklahoma, the inquiry collapses into a single analysis as the Oklahoma long-arm statue provides that "[a] court of this state may exercise jurisdiction on any

basis consistent with the Constitution of this state and the Constitution of the United States." 12 O.S. § 2004(F). Under the federal Constitution, a federal court sitting in diversity "may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (citations and quotations omitted). "The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Id. at 292.

The minimum contacts standard may be met in two ways. First a court may exercise specific jurisdiction over a nonresident defendant "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). Where a court's exercise of jurisdiction does not directly arise form the forum-related activities, that court may nevertheless maintain general personal jurisdiction over the defendant based upon the defendant's general business contacts with the forum state. Hall, 466 U.S. at 415. In this case, Interfab has not argued that the Court may exercise general jurisdiction. As such, the Court will limit its jurisdictional inquiry to whether assertion of specific jurisdiction is proper.

The focus for analyzing these contacts is whether they represent an effort by the defendant to purposefully avail itself of the privilege of conducting activities within the forum state. Burger King, 471 U.S. at 474-75. "Purposeful availment analysis turns upon whether the defendant's contacts are attributable to his own actions or solely to the actions of the plaintiff . . . [and generally] requires . . . affirmative conduct by the defendant which allows or promotes the transaction of business within the forum state." Rambo v. American Southern Insurance Co., 839 F.2d 1415, 1420

(10th Cir. 1988).

In the instant case, the Court finds that Interfab made a prima facie showing that Valiant purposefully availed itself of the privilege of transacting business in Oklahoma. The pleadings establish, inter alia, that Melhus traveled to Oklahoma in order to enter into a contract with Interfab and that he returned when problems arose, in order to resolve the contractual dispute and to seek affirmation of the contract. Valiant's argument that Interfab sought it out and completely negotiated the contract in Norway contradicts Interfab's version of the facts, but cannot carry the day, as the Court is directed to resolve all factual disputes in favor of the plaintiff at this point in the proceedings. Behagen, 744 F.2d at 733. Further, Valiant's assertions that all terms essential to the contract were finalized in Norway and that Melhus' journey to Oklahoma to sign the contract was solely at Interfab's behest and completely fortuitous are not consistent with Interfab's version of the facts. Moreover, if Interfab's allegations are correct, it "is somewhat disingenuous for [Valiant] to derive economic benefits from business dealings in the state of Oklahoma -- dealings directed at a resident of the state -- while disclaiming any connection with the forum state." Rainbow Travel Service, Inc. v. Hilton Hotels Corp., 896 F.2d 1233, 1238 (10th Cir.1990). In sum, Interfab has made a prima facie showing that the Court has personal jurisdiction over Valiant.[2] Naturally, if the instant case

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[2] Valiant relies heavily on Hall in arguing that personal jurisdiction is lacking. The Court is of the opinion, however, that Valiant has misread the Supreme Court's discussion and holding in Hall. Unlike the present case, Hall noted that the parties conceded that specific jurisdiction was not an issue; rather, the Hall plaintiffs relied upon general jurisdiction in an attempt to show that a state court in Texas had personal jurisdiction over the nonresident defendant. Id., 466 U.S. at 414-415. Here, however, the Court is presented with the question of whether specific jurisdiction exists over Valiant, since the present suit is "related to or 'arises out of' [Valiant's] contacts with the forum." Id. at 414. In concluding that personal jurisdiction was lacking in Hall, the Supreme Court simply found that the nonresident defendant's contacts with the State of Texas did not "constitute the kind of continuous and systematic general business contacts" sufficient to establish general personal jurisdiction. Id. at 416. In the present case, the Court is not confronted with the question

were to proceed to trial in this Court, Valiant may demand that Interfab prove the facts supporting personal jurisdiction by a preponderance of the evidence. American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, 710 F.2d 1449, 1455 (10th Cir. 1983).

In light of this ruling, the Court must also deny Phillips Norway's motion to dismiss for failure to join an indispensable party. Interfab has perfected service on Valiant,[3] and the Court has determined that Interfab has made a prima facie showing that personal jurisdiction exists over Valiant.

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of whether such general jurisdiction was shown, but, rather, the Court must determine whether Valiant has purposefully directed its activities at the residents of the forum and whether the litigation results from alleged injuries that arise out of or relate to those activities. Burger King Corp., 471 U.S. at 472. As discussed above, the Court has concluded that Interfab has met its burden of making a prima facie showing that specific jurisdiction does exist over Valiant.

[3] On July 31, 1998, Interfab filed a Return of Service of Summons and Complaint advising the Court that Valiant has been served in accord with the Hague Convention. Valiant complains, however, that the Summons and Complaint served on Valiant were not translated into Norwegian, and, as such, Interfab has not complied with the service requirements of the Hague Convention. The Court disagrees. The Court has found nothing in the Hague Convention which requires the translation of documents generally, nor has the Court found any declaration made by Norway requiring such translation. Rather, Article 5 of the Convention provides that the Central Authority of a signatory country "*may* require the document to be written in, or translated into, the official language . . . of the State addressed." This language merely permits a participating country to require that a document be translated, but, absent a declaration by a country to such effect, there is simply no requirement that such translation be made. See Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383, 1389 (8th Cir. 1995) (the Convention only states that the Central Authority may require translation, not that it must impose that requirement); Lemme v. Wine of Japan Import, Inc., 631 F.Supp. 456, 464 n.10 (E.D.N.Y. 1986) (the translation provision of Article 5 is not mandatory). Given the plain language of the Convention permitting a country to require translation, but not actually imposing such a requirement, the Court therefore disagrees with the holdings of Borschow Hospital & Medical Supplies, Inc. v. Burdick-Siemens Corp., 143 F.R.D. 472, 480 (D.Puerto Rico 1992) and Bankston v. Toyota Motor Corp., 123 F.R.D. 595, 599 (W.D.Ar. 1989). It is also important to note that the Eighth Circuit in Northrup, a case decided subsequent to Bankston, held that no translation requirement is imposed by the Convention -- since Bankston is a case from a district court located in the Eighth Circuit, it is arguable that its holding requiring translation has been implicitly overruled. Moreover, the Central Authority's lack of objection in this case indicates that the service of summons upon Valiant is valid and proper.

Hence, Phillips Norway's argument is moot as the indispensable party has been joined.

Although a prima facie showing as to the existence of personal jurisdiction has been made, the Court may nevertheless dismiss this case under the doctrine of forum non conveniens.[4] Needham v. Phillips Petroleum Co. of Norway, 719 F.2d 1481, 1483 (10th Cir. 1983) (citations omitted). A "federal court sitting in a diversity action is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case to a foreign forum." In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1159 (5th Cir. 1987). See also Rivendell Forest Products, Ltd. v. Canadian Pacific Limited, 2 F.3d 990, 992 (10th Cir. 1993) (in diversity suits, forum non conveniens is governed by federal law). Further, the burden is on the moving party to establish the need for dismissal under forum non conveniens. Id. at 993.

In order to apply the doctrine in the instant case, the Court "must conduct a choice of law analysis in order to determine whether American or foreign law governs. If American law is applicable to the case, the forum non conveniens doctrine is inapplicable." Needham, 719 F.2d at 1483 (citations omitted). The Court must also determine whether an adequate alternate forum exists.

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[4] Since defendants do not seek to have this action transferred to another forum within the United States, 28 U.S.C. § 1404 does not govern the present case. Section 1404(a) provides that, "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Although § 1404 does not authorize transfer or dismissal here, the Court may, pursuant to its inherent power, "decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 828 (5th Cir. 1993). See also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981) (although § 1404 was drafted in accordance with the doctrine of forum non conveniens, it was intended to be a revision rather than a codification of the common law). Moreover, should the Court find that a foreign country, Norway, is the more convenient forum, as defendants contend, dismissal, rather than an attempt to transfer, is appropriate. See In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1159 n.15 (5th Cir. 1987) ("Only when the more convenient forum is a foreign country can a suit brought in a proper federal venue be dismissed on grounds of forum non conveniens.").

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

In diversity actions, federal courts are to employ the substantive and choice of law rules of the forum state. Tucker v. R.A. Hanson Co., Inc, 956 F.2d 215, 217 (10th Cir. 1992). The present action is comprised of two causes of action: (1) breach contract for sale of goods, and (2) tortuous conduct, including fraud and business interference. For the following reasons, the Court finds that Norwegian law controls in this case.

To determine the law applicable to a contract dispute involving the sale of goods, Oklahoma employs the "significant relationship test," and, specifically, Oklahoma courts look to the place of delivery for the applicable law, unless another forum's relationships are more significant.[5] Collins Radio Co. of Dallas, Texas v. Bell, 623 P.2d 1039, 1047 (Okla.Ct.App. 1980) (applying Restatement (Second) of Conflict of Laws, §§ 188(2) and 191). That is, the law of the place of delivery is the law to be applied provided that no other forum has closer ties. Id. Cf. Panama Processes, S.A. v. Cities Service Co., 796 P.2d 276, 288 (Okla. 1990) (noting that although the Oklahoma Court of Appeals in Collins adopted the Restatement's most significant relationship test in a contract case, the

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[5] With respect to contracts involving the sale of goods, Oklahoma law provides that in the absence of agreement, the Oklahoma Commercial Code applies to transactions bearing an appropriate relation to the state. 12A O.S. § 1-105(1). Hence, the court in Collins concluded that "the threshold question becomes what relation is appropriate." 623 P.2d at 1045. Since, as Collins noted, neither § 1-105 nor the comments direct which state's substantive law is to be applied when there are two or more jurisdictions that bear an appropriate relation to the transaction, the Collins court looked to the Restatement's "significant relationship test" to determine which law should apply. Id. at 1046-1047. The court concluded that the Restatement's "'most significant relationship' test will allow application of the law of the jurisdiction most intimately connected to the issues involved. The adoption of this test complies with and carries out the directive of section 1-105 that the law chosen bear an appropriate relation to the transaction." Id. at 1047.

Oklahoma Supreme Court has not yet extended the test to contract questions).[6]

Here, the contract called for delivery to occur in Stavanger, Norway. Thus, Norwegian law applies provided Oklahoma's relationships to the transaction are not more significant. Oklahoma has the following significant contacts with the instant transaction: 1) it is the place of contract execution and some negotiation; and, 2) it is the domicile of Interfab and Phillips Norway's parent company. By contrast, (1) some negotiation took place in Norway, (2) Norway is the place where the relationship arose, (3) the goods are located in Norway, (4) Valiant is incorporated in Norway, (5) the place of business of both Valiant and Phillips Norway is in Norway, and (6) performance and delivery were to take place in Norway. In light of the circumstances, the Court finds that Norway has the most significant relationship to this case and that Norwegian law is the applicable law to Interfab's contract claims.

Likewise, the Court finds that Norwegian law governs Interfab's tort claims. Oklahoma also employs a significant relationship test in determining the applicable law to tort claims, which requires the Court to evaluate the following factors: 1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and, 4) the place where the relationship, if any, between the parties occurred. Brickner v. Gooden, 525 P.2d 632, 637 (Okla 1974). In the present case, Norway

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[6] The Court notes that Oklahoma's general statutory law of contracts provides: "A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." 15 O.S. § 162. Hence, if a place of performance is indicated, "the law of the place of performance controls under [§ 162], and there is no need to determine the law of the place where the contract was made, nor to adopt any other approach to determine the applicable law." Panama Processes, 796 P.2d at 287. However, the court in Collins held that "the choice of law rule in section 1-105 supersedes the general contract choice of law found at . . . § 162." Collins, 623 P.2d at 1045.

was where the injury and precipitating conduct occurred as the equipment was delivered there. Norway is also the place of business for both Valiant and Phillips Norway. The places of incorporation are not persuasive in the analysis as Interfab, Valiant, and Phillips Norway are incorporated in Oklahoma, Norway, and Delaware respectively. Nor is the place of relationship because the relationship, although arising in Norway, also took place in Oklahoma. Taking these factors into account, the Court concludes that the balance of factors in this matter favors Norway as well. Thus, Norwegian law will apply to Interfab's tort claims.

Once the Court determines that foreign law is applicable, the Court must further determine whether Norway is an adequate alternate forum. Valiant has provided the Court with an affidavit sworn by a Norwegian professor of law, Kai Kruger, which advises that Norwegian law provides a cause of action and remedies, including monetary damages and specific performance, for breach of contract. The affidavit further states that Norway recognizes a cause of action comparable to the American torts of fraud and business interference and that litigants may waive any applicable statute of limitations. Interfab, on the other hand, does not dispute any of defendants' assertions, but merely states in a cursory fashion that both parties will receive justice in this forum. The Court concludes that Norway does provide an adequate forum in which to adjudicate this case.

Once it is established that foreign law controls, the Court must then apply the forum non conveniens factors enunciated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), in order to determine which forum should hear the case. Needham, 719 F.2d at 1483. "If it decides that the lawsuit should be tried in a forum away from the United States, . . . the [C]ourt should dismiss the case on the ground of forum non conveniens." Id. The dismissal, however, is contingent upon the defendants' submitting to the jurisdiction of the foreign court and upon the defendants' waiver of

defenses such as the statute of limitations, or any others that would deprive the foreign court of jurisdiction. Id. (citations omitted).

In Gulf Oil Corp., the Supreme Court directed the Court to consider several factors which examine the ease of conducting a lawsuit when deciding whether application of the doctrine of forum non conveniens is warranted. The factors to be addressed are "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." Gulf Oil Corp., 330 U.S. at 508. The Court must further consider the private interest of the plaintiff. Id.

With respect to accessing the sources of proof and witness availability, it must be noted that all of the evidence, except for that in Interfab's possession, is located in Norway. Specifically, evidence related to the Phillips Norway/Valiant sales agreement, along with supporting documents, and documents related to the Interfab/Valiant sales agreement are located in Norway. Further, the equipment which is at the basis of this suit is located in Norway. Additionally, witnesses indispensable to this suit reside in Norway and are beyond the subpoena power of this Court. See Kultur International Films Ltd. v. Covent Garden Pioneer, 860 F.Supp. 1055, 1066 (D.N.J. 1994). Melhus, the project manager who negotiated and executed the Valiant/Interfab agreement, is no longer employed by Valiant, and Kjell Sorenson, the managing director who took part in negotiating the Valiant/Interfab agreement, is also no longer with Valiant. This concern is paramount because the fixing of a "place of trial at a point where litigants cannot compel personal attendance [of witnesses] and may be forced to try their cases on deposition, is to create a condition not satisfactory

to court, jury or most litigants." Gulf Oil Corp., 330 U.S. at 511. The absence of these witnesses is especially problematic when considering that, due to the nature of Interfab's claims, live testimony is all but required for a fair and just adjudication. Kulter Films, 860 F.Supp. at 1067. Moreover, even if necessary witnesses agreed to voluntarily appear to testify in this Court, the cost to the parties of securing their attendance would be unnecessarily high, in light of the fact that most of the witnesses who might be called reside in Norway.

As a final concern, the Court must take into account the plaintiff's choice of forum. It is true, as Interfab argues, that a plaintiff's choice of forum is entitled to a good deal of deference, and "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil Corp., 330 U.S. at 508. However, the Supreme Court has also instructed that an American "citizen's forum choice should not be given dispositive weight," and although "[c]itizens or residents deserve somewhat more deference than foreign plaintiffs, . . . dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." Piper Aircraft, 454 U.S. at 256 n.23. Moreover, where an American plaintiff chooses to conduct business in a foreign country and then complains of wrongful acts occurring primarily in that country, the plaintiff's ability to rely on citizenship as a talisman against forum non conveniens dismissal is diminished. See Howe v. Goldcorp Investments, Ltd., 946 F.2d 944, 952 (1st Cir. 1991) (dismissing an action alleging a violation of antifraud statutes on forum non conveniens grounds because Canada had closer ties and Canadian law controlled). Further, there is no indication that Interfab is unable, in a practical sense, to litigate this matter in Norway. That is, it has not been shown that a dismissal under forum non conveniens would

essentially deprive Interfab of its ability to pursue this action. Hence, for the reasons stated above, the Court concludes that the balance is strongly in favor of defendants' motions, and application of the doctrine of forum non conveniens in this case is proper. As noted, all the factors weigh in favor of granting defendants' motions, and except for Interfab being located in the forum, Oklahoma has very little contacts with the case.

In short, Valiant and Phillips Norway have shown that the case should be dismissed and tried in Norway. The majority of the documentation, the majority of the witness, and all of the equipment are located in Norway, and the acts giving rise to this lawsuit occurred in Norway. Further, witnesses essential to the adjudication of Interfab's claims may only be compelled to testify in Norway. As such, this case presents the quintessential scenario for application of forum non conveniens. However, under the circumstances presented, dismissal is subject to defendants' submitting to the jurisdiction of the Norwegian courts and waiving all jurisdictional defenses, such as the statute of limitations. Needham, 719 F.2d at 1483.

Accordingly, Valiant's motion to dismiss for lack of jurisdiction is DENIED; Phillips Norway's motion to dismiss for failure to join an indispensable party is DENIED; defendants' motions to dismiss for forum non conveniens are GRANTED, provided that defendants submit to the jurisdiction of Norway and waive all jurisdictional defenses. Defendants are directed to promptly advise this Court as to whether they agree to submit to the conditions placed upon dismissal.

IT IS SO ORDERED this 5th day of October, 1998.

H. DALE COOK
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUSAN RICHARDSON,

Plaintiff,

vs.

VIRGIL "BUD" REED, CHIEF, MANNFORD POLICE DEPARTMENT, and THE TOWN OF MANNFORD,

Defendants.

No. 98-C-659-C

Creek Cty: CJ-98-521

ORDER

Before the Court is the Petition for Removal filed by defendants on August 28, 1998. On August 10, 1998, plaintiff, Susan Richardson, filed her Petition against defendants in the District Court of Creek County, alleging discrimination, sexual harassment, wrongful termination, emotional distress, and negligence.[1]

Defendants removed the present case pursuant to 28 U.S.C. §§ 1441 and 1446, citing federal question jurisdiction under 28 U.S.C. § 1331. Defendants contend that since Richardson alleges sex discrimination, harassment, and hostile work environment, the basis for jurisdiction is Title VII, 42 U.S.C. § 2000, et seq. The Court concludes, however, that defendants have failed to show that a federal question exists in this case, and, as such, the present case must be remanded to state court.

The Court notes that Richardson has not filed a motion seeking remand. However, "if the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter." Laughlin v. K-Mart Corp., 50 F.3d 871, 873 (10th Cir.1995), cert. denied, 116

[1] A motion to dismiss or in the alternative, motion for summary judgment, was filed by defendants on September 15, 1998. However, because the Court concludes that this lawsuit must be remanded to state court, the Court will not address said motion.

S.Ct. 174 (1995). "'[T]he rule . . . is inflexible and without exception, which requires [a] court, of its own motion, to deny its jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record.'" Id. (quoting, Ins. Corp. v. Compagnie des Bauxites, 456 U.S. 694, 702 (1982)).

Richardson's Petition, coupled with the representations made in her response to defendants' motion to dismiss, reveal that no federal question has been raised. Although Richardson alleges discrimination, harassment and hostile work environment in her Petition, she does not allege a violation of any specific law.[2] In her response to defendants' motion to dismiss, however, Richardson removes any uncertainty as to the nature of her claims. In the response, Richardson represents that she did not file her claims under Title VII, but, rather, she contends that she is entitled to pursue state law statutory and common law remedies for her claims alleging discrimination, harassment and hostile work environment. Aside from these claims, it is clear that all of the remaining claims allege a violation of state law. Because the Court is satisfied that this action is grounded entirely in state law, the Court finds that it lacks jurisdiction to entertain this action, and, as such, this case was improperly removed. Accordingly, the present case must be and hereby is remanded to the state court in which it was originally filed. 28 U.S.C. § 1447(c).

IT IS SO ORDERED this 5th day of October, 1998.

H. Dale Cook
U.S. District Judge

[2] Such claims are generally cognizable under both federal and state law.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEVO MILLER, INC., and FSM GLENEAGLES, L.P.,	)	
Plaintiffs,	)	
v.	)	Case no. 98-CV-0111B(E)
GTW CONSTRUCTION, INC. and THE GLIDDEN COMPANY a/k/a ICI PAINTS,	)	
Defendants,	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Sevo Miller, Inc. and FSM GlenEagles, L.P., and Defendants, GTW, Construction, Inc. and The Glidden Company a/k/a ICI Paints, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate by and through their counsel of record, that the above-captioned matter, including all claims, counterclaims and causes of action asserted therein, is hereby dismissed with prejudice, with each party to bear its own costs and attorney fees.

DATED THIS 5 day of ~~September~~ October, 1998.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

THE SUM OF THIRTY THOUSAND SIX DOLLARS AND 25/100 ($30,006.25) IN UNITED STATES CURRENCY, et al.

Defendants.

Case No. 97-C-743-E

ORDER

Now before the Court is the Motion to Dismiss (Docket #5) of the claimant Joe Earl Rodgers.

On February 16, 1991, local law enforcement officers in Oklahoma arrested Rodgers and seized numerous items. On March 8, 1991, federal officers attempted to serve Rodgers with an arrest warrant pursuant to a federal indictment, but were unable to do so, apparently because he left the country. The federal authorities then adopted for forfeiture: 1) $30,006.25 in United States currency; 2) $1,951.00 in United States currency; 3) a 1977 Chevrolet Corvette; 4) a 1979 Chevrolet Corvette; and 5) a 1984 Ford Econoline Van. When they did not receive any claims on these items the Drug Enforcement Administration (DEA) administratively forfeited them between May 10, 1991 and June 28, 1991. On March 11, 1997, the Court of Appeals issued an Order to vacate these forfeitures, United States v. Rodgers, 108 F.3d 1247 (10th Cir. 1997), finding that the attempts to give Rodgers actual notice of the forfeitures were not sufficient. On May 30, 1997, the DEA commenced new administrative forfeiture proceedings against the same items, and, when Rodgers did make claim to the property, this civil forfeiture action was commenced on August 15, 1997.

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Rodgers claims that the government's claim must be dismissed for failure to commence the action within the required limitations period. 28 U.S.C. §1621 governs the limitations period for this claim: "No suit or action to recover any duty under section 1592(d), 1593a(d) of this title, or any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years of the time when the alleged offense was discovered. . ." The government argues that §1621 does not bar this suit because the initial action was commenced with the mailing of notices which began on March 25, 1991, well within the §1621 statute of limitations. This argument ignores the plain language of the statute: "No suit . . . shall be instituted unless such suit. . . is commenced within five years of the time . . . the alleged offense was discovered. . ." Clearly, the present suit, in order to be within the limitations period, must have itself been instituted within five years of the time the offense was discovered. Even using the initial date of notice, March 25, 1991 (which necessarily must have been after "the alleged offense was discovered"), this suit is well out of time.

The government also relies on Boero v. Drug Enforcement Administration, 111 F.3d 301, 306 (2d Cir. 1997) and United States v. Marolf, 973 F. Supp. 1139 (C.D. Cal. 1997) for its assertion that, in light of the finding of improper notice, the Court can consider the claim on the merits despite the fact that the statute of limitations has expired. However, while the procedural posture of these decisions is somewhat unclear in the printed opinion, this Court finds them difficult, if not impossible, to reconcile with 28 U.S.C. §1621, and therefore unpersuasive.

Claimant's Motion To Dismiss (Docket #5) is granted. In light of this ruling, Claimant's Motion for Appointment of Counsel (Docket #4) is denied as moot.

IT IS SO ORDERED THIS 2nd DAY OF OCTOBER, 1998.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Plaintiff,

v.

BINGHAM SAND AND GRAVEL, INC. and BINGHAM TRANSPORTATION, INC.,

Defendants.

FILED

OCT -2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0248-B (Ea)

EA

ENTERED ON DOCKET

DATE OCT 06 1998

ORDER

Now before the Court is the Plaintiff's Combined Motion and Brief for Partial Summary Judgment Regarding the Adequacy of the Grade Crossing Warning Devices (Docket #12). This action arises out of a collision between a truck and a train at a railroad grade crossing near Quapaw, Ottawa County, Oklahoma in July, 1996. The plaintiff, Burlington Northern and Santa Fe Railway Company ("Burlington"), seeks damages to repair the train and the crossing, claiming that the defendants, Bingham Sand and Gravel, Inc. and Bingham Transportation, Inc. (collectively, "Bingham"), are vicariously liable for the negligence of the truck driver,[1] and for negligently entrusting the driver with a defective truck. Bingham counterclaimed, seeking damages to its truck.[2]

---

1 The truck driver filed a personal injury suit in the District Court of Ottawa County, Oklahoma. Defendants sought to remove the case to the United States District Court for the Northern District of Oklahoma, Case No. 97-CV-1026H(M). The District Court remanded Case No. 97-CV-1026H(M), and motions to consolidate filed in both actions were denied. Defendants have now moved to consolidate this action with 98-CV-0703K(M), but that motion is not yet at issue before this Court.

2 Bingham also filed a third-party complaint against the driver of the train. The third-party claim has been dismissed. (Order, filed July 6, 1998, Docket #8.)

In its Answer to the Defendant's Counterclaim (Docket # 20, at ¶ 6), Burlington claims that the adequacy of the crossing warning devices is an issue that is preempted by federal law.

Burlington is correct. Furthermore, application of federal law requires a finding in this matter that the warning devices at railroad crossing AAR-DOT #607-386X were adequate at the time of the collision giving rise to this action. The Secretary of Transportation promulgated regulations, pursuant to the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20106, and the Highway Safety Act (HSA), 23 U.S.C. § 401 *et seq.*, as well as other provisions applicable to federal highway programs, 23 U.S.C. § 101 *et seq.*, which cover the subject matter at issue, the installation of railroad grade crossing warning devices. The regulations are set forth at 23 C.F.R. § 646.214(b), which provides, in pertinent part:

> (2) Pursuant to 23 U.S.C. § 109(3), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project approved by the FHWA until adequate warning devices for the crossing are installed and functioning properly.
>
> (3)(i) Adequate Warning Devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:
>
> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
>
> (C) High speed train operation combined with limited sight distance at either single or multiple track crossings.
>
> (D) High speed train operation combined with limited sight distance at either single or multiple track crossings.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school-buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA.

In this matter, Bingham does not dispute whether the location of the grade crossing brings it within the regulation, whether the devices were installed and functioning properly, whether Federal-aid funds participated in the installation of the devices, or whether the requirements of section 646.214(b)(3) are applicable. Burlington established that crossbuck signs were installed at the AAR-DOT #607-386X crossing in February, 1981, in full compliance with the Federal-Aid Railroad Grade Crossing Project RRP-000S(60), (64), (419), an agreement that Burlington's predecessor entered into with the Oklahoma Department of Transportation on November 17, 1978. (Pl. Combined Motion, at 1-2.) The agreement is attached to Burlington's motion, as well as an affidavit from the office engineer of the Burlington's engineering division at the time of the installation project. The agreement and the affidavit also establish that Federal-Aid Railroad Highway Grade Crossing funds paid for ninety percent of the cost of the project.

Bingham submits no contraverting evidence. In its response brief, Bingham states the issue as a disputed material fact: "Whether the United States Department of Transportation Federal Highway Administration ("FHWA") approved the grade crossing warning devices at the railroad grade crossing located near Quapaw, Oklahoma, designated AAR-DOT #670-386X." (Bingham

Resp. Br., at 1.) The United States Court of Appeals for the Tenth Circuit squarely addressed the same issue, albeit at different railroad crossings, in *Armijo v. Atchison, Topeka and Santa Fe Railway Company*, 87 F.3d 1188 (10th Cir. 1996), and *Hatfield v. Burlington Northern Railroad Co.*, 64 F.3d 559 (10th Cir. 1995). Affirming summary judgment for the railroad defendants, the Tenth Circuit held, in each matter, that FHWA approval of crossing warning devices occurs when the FHWA approves the expenditure of federal funds for warning devices. *Armijo*, 87 F.3d at 1190; *Hatfield*, 64 F.3d at 562. The Tenth Circuit decisions reflect the majority view among federal appellate courts. *See Hester v. CSX Transportation, Inc.*, 61 F.3d 382 (5th Cir. 1995); *Elrod v. Burlington Northern R. Co.*, 68 F.3d 241 (8th Cir. 1995); *St. Louis Southwestern Ry. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994); *Ingram v. CSX Transportation, Inc.*, 146 F.3d 858 (11th Cir. 1998); *but see Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1998).

As Burlington points out, Bingham's reliance on *Eldridge v. Missouri Pacific Railroad*, 832 F.Supp. 328 (E.D. Okla. 1993), is misplaced because that decision was rendered prior to *Armijo* and *Hatfield*. While the analysis in *Eldridge*, like the insightful analysis in *Shots*, is persuasive, we are bound by the decisions of the Tenth Circuit. Bingham's reliance on *CSX Transportation, Inc., v. Easterwood*, 507 U.S. 658 (1993), is similarly misplaced because, as the *Easterwood* court specifically noted, the record did not establish that federal funds participated in the installation of the warning devices at the subject crossing in that matter. *Id.* at 672. As discussed above, and as a majority of courts examining *Easterwood* have held, the event that constitutes federal approval and triggers federal preemption is the expenditure of federal funds.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see generally Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A party opposing a motion for summary judgment may not rest upon the bare allegations in the complaint, but must set forth specific facts demonstrating a genuine issue for trial. *Anderson*, 477 U.S. at 248-49. A factual dispute is material only if, under the applicable law, its resolution might affect the outcome of the case. A dispute is genuine only if a reasonable finder of fact could return a verdict for the nonmoving party. *Id.* There remains no genuine issue of material fact with regard to Bingham's inadequate signalization claim. Burlington, as the moving party, is therefore entitled to partial summary judgment as a matter of law.

CONCLUSION

The Tenth Circuit equates the expenditure of federal funds by the FHWA with the Secretary of Transportation's approval of railroad grade crossing warning devices under the applicable federal regulations, and the federal regulations preempt state law negligence claims on this issue. Thus, the warning devices at the Quapaw crossing, AAR-DOT #607-386X, were adequate. Plaintiff's Combined Motion and Brief for Partial Summary Judgment Regarding the Adequacy of the Grade Crossing Warning Devices (Docket #12) is **GRANTED.**

Dated this 2nd day of October, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

NTC OF AMERICA, INC.

Debtor,

JOHN H. WILLIAMS, Plan Trustee of NTC OF AMERICA, INC.,

Appellant,

vs.

EMPIRE FIRE AND MARINE INSURANCE COMPANY and WESTPHALEN, BRADLEY & JAMES, INC.

Appellees.

Case No. 97-CV-0819-H(E)

ORDER OF DISMISSAL OF APPEAL WITH PREJUDICE

NOW COMES before the Court the Stipulation of Dismissal with Prejudice of the Parties in the referenced matter, which is an Appeal of a Judgment in an Adversary Proceeding in the Bankruptcy Court for the Northern District of Oklahoma, No. 91-0221.

The Court, being fully advised, hereby ORDERS that the referenced Appeal, No. 97-CV-0819-H(E), is hereby DISMISSED WITH PREJUDICE to any refiling. It is also ORDERED that the referenced Stipulation of Dismissal with Prejudice and this Order of Dismissal of Appeal with Prejudice will be entered on the docket in the underlying

Adversary Proceeding in the Bankruptcy Court for the Northern District of Oklahoma, No. 91-0221.

IT IS SO ORDERED.

DATED: October 2, 1998

THE HONORABLE SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

JRC/meo

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	NO. 98CV512H(J)
BOBBY J. BRATTON, D.D.S.,	)	
Defendant.	)	

ENTERED ON DOCKET
DATE OCT 6 1998

FILED
OCT 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT

This matter comes on for consideration this 5th day of ~~September~~ October, 1998, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Bobby J. Bratton, D.D.S., appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Bobby J. Bratton, D.D.S., was served with Summons and Complaint on August 25, 1998. The Defendant has not filed an Answer but in lieu thereof has agreed that Bobby J. Bratton, D.D.S. is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Bobby J. Bratton, D.D.S. in the principal amount of $8,287.34, plus accrued interest in the amount of $273.48, plus interest thereafter at the rate of 8.25% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of $8,287.34, plus accrued interest in the amount of $273.48, plus interest thereafter at the rate of 8.25% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

LORETTA F. RADFORD
Assistant United States Attorney

BOBBY J. BRATTON, D.D.S.

LFR/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL CLAYTON TUCKER,

Plaintiff,

vs.

AT&T WIRELESS SERVICES,

Defendant.

Case No. 97CV878 H (M)

ORDER

Now on the 21st day of August, 1998, Defendant's Motion for Summary Judgment came on for hearing before the Court. Jonathan Sutton and Brian Danker appeared on Plaintiff's behalf; James A. Kirk and Thomas J. Daniel IV appeared on Defendant's behalf. Upon reviewing the briefs and evidence submitted by the parties, and after hearing the argument of counsel, the Court finds as follows:

1. While there is some evidence of a frayed supervisor/employee relationship, there is nothing in the record, as conceded by counsel for the Plaintiff, that Defendant's actions toward the Plaintiff were based on racial animus.

2. There is no evidence in the record that the Defendant's stated reasons for terminating the Plaintiff are pretextual in nature, i.e., not worthy of belief.

3. Plaintiff questioned his supervisor in front of a lower level employee during the course of an investigation of that lower level employee, despite having been repeatedly warned against such behavior. This is not disputed by the Plaintiff. Such behavior would have likely resulted in immediate discharge in many workplaces throughout the United States. Title VII endeavors to

create equal protection for all citizens and were Plaintiff not subject to ramifications, including discharge, for such behavior, this would create a protection around a protected class which would distinguish the Plaintiff's rights from those enjoyed by other at will employees.

4. Plaintiff's claim for discriminatory discharge also fails because Plaintiff has not satisfied one of the elements of a prima facie case as set forth in Murray v. City of Sapulpa, 45 F.3d 1417 (10th Cir. 1995), namely that the Plaintiff's position must have remained open or been filled by a non-class member. The uncontroverted evidence here is that Plaintiff's duties were assumed on an interim basis by another minority employee, Mr. Eric Gahagan. Mr. Gahagan was eventually offered Plaintiff's former position on a permanent basis, an offer which he declined.

5. Plaintiff further concedes, through counsel, that his position was eliminated in March of 1998. Accordingly, Plaintiff's front-pay damages would have been restricted to the time period up to March of 1998.

IT IS THEREFORE ORDERED that, for the above-stated reasons, the Motion for Summary Judgment of AT&T Wireless Services of Tulsa, Inc. is hereby granted.

Dated this 1ST day of OCTOBER, 1998.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

AT&T\TUCKER\ORDER

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE SUM OF ONE HUNDRED THIRTY-EIGHT THOUSAND ONE HUNDRED FIFTY AND NO/100 DOLLARS ($138,150.00) IN UNITED STATES CURRENCY,

Defendant,

CIVIL ACTION NO. 97-CV-689-H

JUDGMENT OF FORFEITURE AS TO DEFENDANT CURRENCY

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default as to the defendant One Hundred Thirty-Eight Thousand One Hundred Fifty and no/100 Dollars ($138,150.00) in United States Currency as to all entities and/or persons interested in the defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 28th day of July, 1996, alleging that the defendant currency is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6), because it was furnished or intended to be furnished in exchange for a controlled substance, or is proceeds traceable to such an exchange or is money used, or intended to be used, to facilitate a violation of Title 21 of the United States Codes, and therefore subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice In Rem was issued on the 28th day of July, 1997, by the Clerk

of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant currency and for publication of notice of arrest and seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, 8545 East 41st Street, Tulsa, Oklahoma, a newspaper of general circulation in the district in which this action is pending and in which the defendant currency was located, and further providing that the United States Marshals Service personally serve the defendant currency and all known potential owners thereof with a copy of the Complaint for Forfeiture In Rem and Warrant of Arrest and Notice In Rem, and that immediately upon the arrest and seizure of the defendant currency the United States Marshals Service take custody of the defendant currency and retain the same in its possession until the further order of this Court.

On the 15th day of August, 1997, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant currency.

Emad "Eddie" Aldada and Joe W. Linkenheimer were determined to be the only potential claimants in this action with possible standing to file a claim to the defendant currency. The United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant currency as follows:

> Emad "Eddie" Aldada, served August 8, 1997 by serving his attorney, C. Rabon Martin.
>
> Joe W. Linkenheimer, served August 18, 1997 by serving his attorney, Lonny Davis.

Emad "Eddie" Aldada filed his Statement of Claim, Demand for Jury Trial and Motion to

Consolidate as to the defendant currency, on August 20, 1997.

USMS 285 reflecting the service upon the defendant currency and all known potential claimants is on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant currency was located, on September 4, 11, and 18, 1997. Proof of Publication was filed October 14, 1997.

No other claims in respect to the defendant currency have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired.

The claim of Emad "Eddie" Aldada was stricken by this Court on the 29th day of May, 1997 for failure to participate in the discovery process and failure to comply with the express orders of this Court.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant currency:

One Hundred Thirty-Eight Thousand One Hundred Fifty Dollars ($138,150.00) In United States Currency

be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 30TH day of September, 1998.

SVEN ERIK HOLMES
Judge of the United States District Court for the Northern District of Oklahoma

SUBMITTED BY:

CATHERINE J. DEPEW
Assistant United States Attorney

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Housing and Urban Development,

Plaintiff,

v.

GARY C. SANDERS;
CAROLE LYNN SANDERS;
CITY OF BROKEN ARROW, OKLAHOMA;
COUNTY TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 98-CV-0495-H (E)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5th day of October, 1998. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, City of Broken Arrow, Oklahoma, appears by Debra L. W. Kurzban, Assistant City Attorney; and the Defendants, Gary C. Sanders and Carole Lynn Sanders, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Gary C. Sanders, executed a Waiver of Service of Summons on July 17, 1998; that the Defendant, Carole Lynn Sanders, executed a Waiver of Service of Summons on July 17, 1998.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on July 29, 1998; that the Defendant, City of Broken Arrow, Oklahoma, filed its Answer on July 29, 1998; and that the Defendants, Gary C. Sanders and Carole Lynn Sanders, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon certain promissory note and for foreclosure of a mortgage upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Fifteen (15), Block Six (6), KENTWOOD ESTATES, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on May 31, 1983, Robert M. Keller and Michelle M. Keller executed and delivered to First Security Mortgage Company their mortgage note in the amount of $71,500.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Robert M. Keller and Michelle M. Keller executed and delivered to First Security Mortgage Company, a real estate mortgage dated May 31, 1983, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on June 3, 1983, in Book 4696, Page 844, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1985, First Security Mortgage Company assigned the above-described mortgage note and mortgage to CFS Mortgage Corporation. This Assignment of Mortgage was recorded on January 22, 1986, in Book 4920, Page 318, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 15, 1990, Commercial Federal Mortgage Corporation f/k/a CFS Mortgage Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on June 15, 1990, in Book 5259, Page 1295, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, Gary C. Sanders and Carole Lynn Sanders, currently hold the fee simple title to the property by virtue of General Warranty Deed dated August 18, 1986 and recorded on August 21, 1986 in Book 4964, Page 1472 in the records of Tulsa County, Oklahoma, and are the current assumptors of the subject indebtedness.

The Court further finds that Defendants, Gary C. Sanders and Carole Lynn Sanders, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of $68,961.62, plus administrative charges in the amount of $798.09, plus penalty charges in the amount of $2,143.81, plus accrued interest in the amount of $53,744.14 as of January 29, 1997, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, City of Broken Arrow, Oklahoma, disclaims any right, title or interest in the subject real property with the exception of owning certain easements contained in the plat of the Kentwood Estates Addition.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Gary C. Sanders and Carole Lynn Sanders, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against Defendants, Gary C. Sanders and Carole Lynn Sanders, in the principal sum of $68,961.62, plus administrative charges in the amount of $798.09, plus penalty charges in the amount of $2,143.81, plus accrued interest in the amount of $53,744.14 as of January 29, 1997, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.730 percent per annum until fully paid, plus the costs of this action accrued and accruing.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the subject real property with the exception of owning certain easements contained in the plat of the Kentwood Estates Addition.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Gary C. Sanders, Carole Lynn Sanders, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma,

commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

> **First**:
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;
>
> **Second**:
> In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

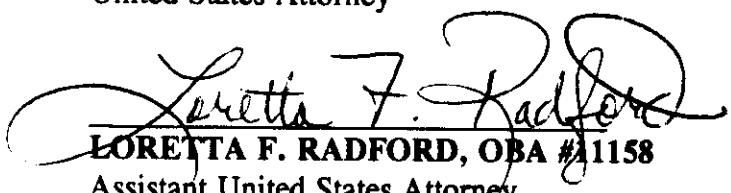
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

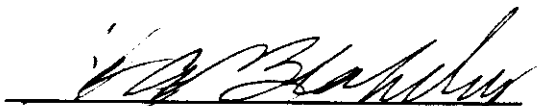
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #882
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(918) 596-4841
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 98-CV-0495-H (E) (Sanders)

LFR:css

DEBRA L. W. KURZBAN, OBA #16910
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Judgment of Foreclosure
Case No. 98-CV-0495-H (E) (Sanders)

LFR:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL CUSTER, an individual,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, BY AND THROUGH THEIR LEAD UNDERWRITER, PETER MALCOLM BROTHERTON,

Defendant and Third Party Plaintiff,

v.

FRANCIS CUSTER, A/K/A FRANCIS RANDLES AND ERNEST MIETTUNEN, INDIVIDUALLY, AND ETHAN MIETTUNEN, BY AND THROUGH HIS CUSTODIANS AND NEXT FRIENDS JAMES AND LOUISE JOHNSON,

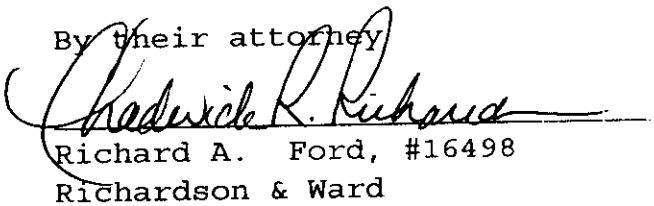
CASE NO. 97-CV-897-H

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties to this action hereby stipulate, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), that all claims, counterclaims and third-party claims shall be dismissed, with prejudice and without costs, all rights of appeal waived.

PAUL CUSTER and FRANCES CUSTER, a/k/a FRANCES RANDLES

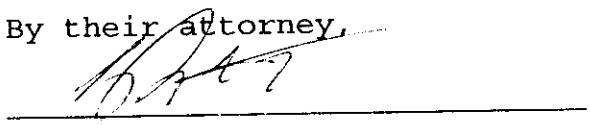
By their attorney



Richard A. Ford, #16498
Richardson & Ward
6846 South Canton, Ste. 200
Tulsa, Oklahoma 74136

ERNEST MIETTUNEN AND ETHAN MIETTUNEN BY AND THROUGH HIS CUSTODIANS AND NEXT FRIENDS JAMES AND LOUISE JOHNSON

By their attorney,



C. Rabon Martin, #5718
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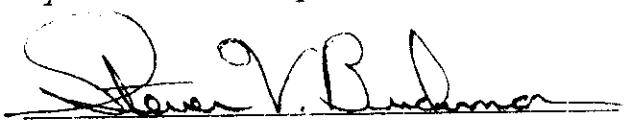
CERTAIN UNDERWRITERS AT LLOYD'S LONDON

By its attorneys,



Steven V. Buckman, #10745
Steven V. Buckman, P.C.
525 South Main, Ste. 660
Tulsa, Oklahoma 74103

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARY ELIZABETH JOHNSON,

Plaintiff,

vs.

CITY OF TULSA,

Defendants.

Case No.97-CV-873-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff.

Dated this 5th Day of October, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

(37)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY ELIZABETH JOHNSON,

Plaintiff,

vs.

CITY OF TULSA,

Defendants.

Case No.97-CV-873-M

ORDER

Defendant's Motion for Summary Judgment [Dkt. 22] is before the court for determination.

Plaintiff has sued the City of Tulsa for damages under 42 U.S.C. § 1983 alleging that through the actions of Tulsa Police Officer, Jack Ritter, she was unconstitutionally deprived of her property, a 1985 Ford pickup truck, without due process of law. She also alleges the City is liable under state law for intentional and negligent infliction of emotional distress; false arrest; false imprisonment; conversion; negligent supervision; and conspiracy to interfere with Plaintiff's civil rights. The City of Tulsa argues that Plaintiff has failed to assert any cause of action for which it may be held liable.

BACKGROUND

Plaintiff's claims center around Officer Ritter's involvement in a dispute over ownership and possession of a 1985 Ford pickup truck. In December, 1995, Plaintiff and Stan Ervin entered into a contract for Mr. Ervin to perform remodeling work on Plaintiff's home in trade for her 1985 Ford truck. The vehicle title was transferred to

Mr. Ervin in January, 1996. Mr. Ervin later sold the truck to Thomas Fields. Plaintiff was dissatisfied with Mr. Ervin's work and obtained a duplicate title to the truck. On March 17, 1996, Mrs. Fields reported the truck stolen and filed an auto theft report. On April 10, 1996, Mr. Fields requested assistance from the Tulsa Police Department in recovering the truck. Tulsa Police Officer, Jack Ritter, went to Plaintiff's residence where the truck was located.

According to Plaintiff, she informed Officer Ritter that she disputed the ownership of the truck and showed him her title. In conclusory fashion, Plaintiff further alleges that Officer Ritter confiscated the truck and transferred it to Mr. Fields before a hearing could be held before a magistrate on the disputed claim in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Art. 2, §7 of the Oklahoma Constitution, and 22 Okla. Stat. § 1321.

According to undisputed assertions in the Affidavit of Officer Ritter, a records check with the Oklahoma Department of Public Safety showed Mr. Fields to be the lawful owner of the truck. He discussed the matter with Plaintiff and told her she was in possession of stolen property. He informed her she could be arrested for possession of stolen property and the truck confiscated until proper ownership could be determined, or she could return the truck to Mr. Fields and then pursue recovery through a civil lawsuit. In his Affidavit Officer Ritter states that Plaintiff chose to return the truck and pursue civil remedies. Plaintiff disputes that she voluntarily returned the truck.

DISCUSSION

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving party "must establish that there is a genuine issue of material fact" and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1455-56, 89 L.Ed.2d 538 (1986). However, the factual record and reasonable inferences to be drawn therefrom must be construed in the light most favorable to the non-movant. *Gullickson v. Southwest Airlines Pilots' Ass'n.*, 87 F.3d 1176, 1183 (10th Cir. 1996).

42 U.S.C. § 1983

To impose liability on the City, Plaintiff must prove that a deliberate action of the City was the moving force behind the deprivation of Plaintiff's federal rights. *Board of County Com'rs of Bryan County Okl v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997). To meet this burden, Plaintiff must identify that a "policy" or "custom" of the City caused the Plaintiff's injury. *Monell v. New*

York City Dept. of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 2027, 56 L.Ed.2d 611. However, the City may not be held vicariously liable for the actions of Officer Ritter on the theory of respondiat superior. *Id.* at 692, 98 S.Ct. at 2036.

The only "evidence" of a "policy" or "custom" of the City offered by Plaintiff is the fact that the City exonerated Officer Ritter when Plaintiff complained about his conduct concerning her truck. This after the fact exoneration of Officer Ritter's conduct does not constitute proof that the City has a "policy" or "custom" which was the cause of Plaintiff's injury.[1]

There being no material facts in dispute, the City is entitled to judgment as a matter of law on Plaintiff's § 1983 claim.

42 U.S.C. § 1985

Plaintiff has also alleged liability under 42 U.S.C. § 1985 for conspiracy to interfere with civil rights. However, a municipal corporation is not a "person" within the contemplation of that statute. *Shadid v. Oklahoma City*, 494 F.2d 1267,1268 (10th Cir. 1974). Consequently, § 1985 does not afford Plaintiff any basis for recovery.

STATE LAW TORTS

The Governmental Tort Claims Act ("GTCA"), 51 O.S. § 151, *et seq.*, is the exclusive remedy for a tort claim brought against a governmental entity in Oklahoma. Therefore, the only recovery available for Plaintiff's state law claims must be found

[1] This Court has not found that any actions taken by Officer Ritter violated Plaintiff's federal rights. But if they did, Plaintiff has completely failed to prove her case against the City.

within the boundaries defined by that Act. *Curtis v. Board of Education of Sayre Public Schools*, 914 P.2d 656, 658 (Okla. 1995).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Oklahoma intentional infliction of emotional distress does not exist as a basis of liability against a municipality. Under the GTCA, political subdivisions of the state are liable for the torts of their employees acting within the scope of their employment. 51 O.S. § 153A. An employees actions are within the scope of employment when he acts in good faith within the duties of his office. 51 O.S. § 152(9).

The tort of intentional infliction of emotional distress is committed where one, by extreme and outrageous conduct, causes severe emotional distress to another. *Breeden v. League Services Corp.*, 575 P.2d 1374, 1376-77 (Okla. 1978). Extreme and outrageous conduct is conduct which is "so outrageous in character, and extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as utterly atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46, Comment d (1965), quoted in *Breeden,* 575 P.2d at 1376.

Engaging in intentional extreme and outrageous conduct is inconsistent with the good faith performance of duties required to bring a municipal employee's actions within the scope of employment as defined in the GTCA. Therefore, a plaintiff can not possibly hold a governmental entity liable for intentional infliction of emotional distress because the only way to prevail on such a claim would be to present evidence which would necessarily take the bad actor outside the scope of his employment and the GTCA. *See McMullen v. City of Del City*, 920 P.2d 528, 530 (Okl. Civ. App. 1996),

cert. denied. The Court concludes therefore, that summary judgment for the City is appropriately granted on this claim.

The Court acknowledges the statement in Plaintiff's brief that she does not seek damages under the GTCA, but under 42 U.S.C. § 1983. The disposition of the § 1983 claim forecloses recovery for Plaintiff's alleged emotional distress under § 1983.

FALSE IMPRISONMENT

False imprisonment is a matter between private persons for a private end, with no intention of bringing the person detained before a court, or of otherwise securing the administration of the law. *McGlone v. Landreth*, 195 P.2d 268, 271 (Okla. 1948) *overruled in part on other grounds by Parker v. Washington*, 421 P.2d 861 (Okla. 1966). Since Plaintiff has brought her action against the City for the acts of a police officer, her claim is properly analyzed as one for false arrest. *Delong v. State ex rel. Oklahoma Dept. of Public Safety*, 956 P.2d 937, 938 (Okl. Civ. App. 1998).

FALSE ARREST

False arrest is the unlawful restraint of an individual against his will. *Delong* 956 P.2d at 938. An arrest made without probable cause is an unlawful arrest. *Overall v. State ex rel. Oklahoma Dept. of Public Safety,* 910 P.2d 1087, 1091 (Okl. Civ. App. 1995), *cert. denied.*

The City argues that it cannot be liable for false arrest because plaintiff was never placed under arrest. In response to the City's motion for summary judgment, Plaintiff asserts as an undisputed fact that she was *threatened* with arrest. She does not assert that she was arrested or restrained in any way. The Court has nothing

before it that would support a finding that Plaintiff was arrested. Therefore, the Court concludes that the City is entitled to summary judgment on this claim.

CONVERSION

The tort of conversion is committed by one who wrongfully exercises temporary or permanent dominion over property owned by another. *Installment Finance Corp. v. Hudiburg Chevrolet. Inc.*, 794 P.2d 751, 753 (Okla. 1990); *White v. Webber-Workman Co.*, 591 P.2d 348, 350 (Okl. Civ. App. 1979). One seeking damages for conversion must plead and prove (a) he owns or has right to possess the property in question; (b) that defendant wrongfully interfered with such property right; and (c) damages. *White*, 591 P.2d at 350.

That Plaintiff had the right to possess the truck has not been established. Plaintiff has made the unsupported assertion that she was the legal owner of the truck. However, assuming *arguendo* that she did have that right, the undisputed facts demonstrate that Officer Ritter did not *wrongfully* interfere with Plaintiff's assumed right to possess the truck.

Plaintiff does not dispute that the 1985 Ford Truck had been *reported* stolen. Plaintiff does not dispute that the registration check Officer Ritter performed showed Mr. Fields, not Plaintiff, to be the registered owner of the subject truck. Plaintiff only disputes that she voluntarily returned the truck to Mr. Fields. According to her First Amended Petition,[2] "The Plaintiff requested that the officer/employee of the Tulsa

[2] Plaintiff's case was filed in state court and removed to federal court. *See* attachments to Dkt. 1.

Police Department impound the 1985 Ford Pickup Truck, Vehicle Identification Number (VIN) 1FTEF14H3FKA56084 until the validity of Plaintiff's title could be verified." [Dkt. 1, Amended Petition, p. 6, ¶ 13]. Taking Plaintiff's allegations in the light most favorable to her, it is clear that Plaintiff has not stated a claim for conversion. Plaintiff does not claim that the vehicle was wrongly *taken* from her, but that following the taking Officer Ritter failed to follow the statutory procedure set out at 22 O.S. Supp. 1995 § 1321 C for its disposition. The Court finds that the City of Tulsa is entitled to summary judgment on this claim.

CONCLUSION

Viewing the facts in the light most favorable to Plaintiff, the Court finds no basis for imposing liability on the City for the actions of Officer Ritter. Accordingly, the Court GRANTS Summary Judgment in favor of Defendant, City of Tulsa, and against, Plaintiff, Mary Elizabeth Johnson.

SO ORDERED this 5th Day of October, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIFFANY Y. SMITH,
SSN: 440-72-1952

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

ENTERED ON DOCKET
DATE OCT 06 1998

No. 97-C-960-J

FILED
OCT - 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 5th day of October 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(14)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIFFANY Y. SMITH,
SSN: 440-72-1952

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

ENTERED ON DOCKET
DATE OCT 06 1998

No. 97-C-960-J

FILED
OCT - 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER[2/]

Plaintiff, Tiffany Y. Smith, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) Plaintiff is mentally incapable of working; (2) Plaintiff meets Listing 12.05 for mental retardation; and (3) the ALJ did not pose appropriate hypothetical questions to the vocational expert. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge Leslie Hauger (hereafter "ALJ") concluded that Plaintiff was not disabled on July 3, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on September 25, 1997. [R. at 8].

(13)

I. PLAINTIFF'S BACKGROUND

Plaintiff was born December 16, 1975 and was 20 years old at the time of the hearing before the ALJ. Plaintiff testified that she worked at a laundry on Saturdays and Sundays but that the laundry fired her because she was too slow. [R. at 129]. Plaintiff generally has a difficult time comprehending instructions. Plaintiff testified that she did housework and could read. [R. at 137].

An RFC completed May 25, 1995, indicated that Plaintiff was markedly restricted in her ability to remember, to carry out detailed instructions, and to interact with the public. [R. at 46]. A psychological evaluation completed on September 19, 1995, indicated that Plaintiff had a full scale IQ of 70. [R. at 115]. Plaintiff additionally submitted papers indicating that her IQ was 38.[4/]

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

[4/] This IQ assessment was completed September 17, 1997. It was submitted by facsimile to the Appeals Counsel on September 18, 1997. The Appeals Council reached a decision on this case on September 25, 1997. The additional papers (indicating Plaintiff has an IQ of 38) which were submitted by Plaintiff to the Social Security Administration were not included in the record on review. Defendant provides no explanation as to why the materials were not included in the record on appeal. Defendant does contend that the information which was not included in the record on appeal, was not new or material, and should therefore not be considered by this Court. Plaintiff contends that since the material was submitted prior to the decision of the Appeals Council, the material should have been included in the appellate record. The Court concludes that this case must be reversed on other grounds and thus there is no need to determine whether or not the materials were properly submitted below, or are new and material. On remand, the Commissioner may consider the materials and the obvious discrepancy between the reported IQs.

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Comrnissioner has established a five-step process for the evaluation of social security claims.[5/] See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of

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[5/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[6/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

[6/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ did not discuss any applicable Listings.

IV. REVIEW

Listings

At the conclusion of the hearing, Plaintiff's attorney asserted that Plaintiff either met or equaled Listing 12.05. Listing 12.05 provides as follows:

Listing 12.05 provides:

> *Mental Retardation and Autism:* Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22). . . . The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
>
> * * *
>
> B. A valid verbal, performance, or full scale IQ of 59 or less;[7/]
>
> C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function;
>
> D. A valid verbal, performance, or full scale IQ of 60 through 70 . . . with either condition resulting in two of the following:

7/ Although the evidence was not available at the time of the hearing before the ALJ, the additionally submitted exhibits by Plaintiff indicate her IQ at 38.

> 1. Marked restriction of activities of daily living; or
> 2. Marked difficulties in maintaining social functioning; or
> 3. deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or
> 4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05 (italics in original).

In Clifton the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at step three, or even identify the relevant listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment.

In this case, Listing 12.05 is clearly the potentially applicable Listing. However, the ALJ, in his opinion, did not discuss Listing, or his basis for obviously concluding that Plaintiff did not meet a Listing.

In Clifton v. Chater, the Tenth Circuit held as follows:

> Under the Social Security Act,
>
> > [t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the

> Commissioner's determination and the reason or reasons upon which it is based.
>
> 42 U.S.C. 405(b)(1). . . .
>
> This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .
>
> In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed Impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

Because the ALJ did not discuss the applicable Listing, the Court is compelled to reverse this decision to the Commissioner. In addition, on remand the Commissioner can consider the additional evidence submitted by Plaintiff that her IQ is actually 38.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 5 day of October 1998.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHYLLIS J. RHODEN for STEVEN A. RHODEN, a minor, SS# 441-96-3960

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

ENTERED ON DOCKET
DATE OCT 06 1998

No. 97-C-861-J

FILED
OCT - 1 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 30th day of September 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(12)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHYLLIS J. RHODEN for STEVEN A. RHODEN, a minor, SS# 441-96-3960

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

ENTERED ON DOCKET
DATE OCT 06 1998

No. 97-C-861-J

FILED
OCT - 1 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER[2/]

Plaintiff, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because Plaintiff meets Listing 112.11 for Attention Deficit Hyperactivity Disorder. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision for further proceedings consistent with the Order of the Court.

1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

2/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3/ Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on October 31, 1995. [R. at 16]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on July 18, 1997. [R. at 4].

(11)

I. PLAINTIFF'S BACKGROUND

Steven Rhoden was born April 11, 1991, and was six years old at the time of the hearing before the ALJ. [R. at 110].

Plaintiff asserts that he has been diagnosed with attention deficit hyperactivity disorder, and that he meets a Listing.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The statutes and regulations in effect at the time of the ALJ's decision required application of a four-step evaluation process. See 42 U.S.C. § 1382c(a)(3)(A)(1994); 20 C.F.R. § 416.924(b)(1994).

After the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act. Pub. L. No. 104-193, 110 Stat. 2105. This Act amended the substantive standards for the evaluation of children's disability claims. The statute currently reads:

> An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual had a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 1382c(a)(3)(C)(i). The notes following the Act provide that this new standard for the evaluation of children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act (August 22, 1996). This includes cases in which a request for judicial review is pending. Consequently, this new standard applies to the Plaintiff's case. See also Gertrude

Brown for Khilarney Wallace v. Callahan, 120 F.3d 1133 (10th Cir. 1997) (applying new standards to a children's disability appeal).

The regulations which implement the Act provide:

> (d) *Your impairment(s) must meet, medically equal, or functionally equal in severity a listed impairment in appendix 1.*
> An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.
>
> > (1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.
> > (2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.

20 C.F.R. § 416.924. Consequently, based on the applicable statutes and regulations, Plaintiff is disabled only if Plaintiff can establish that she meets a Listing.[4/] See also Brown, 120 F.3d 1133 at 1135 ("In reviewing the Commissioner's decision, therefore, we do not concern ourselves with his findings at step four of the analysis; we ask only whether his findings concerning the first three steps are supported by substantial evidence.").

[4/] At step three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, commonly referred to as the "Listings." An individual who meets or equals a Listing is presumed disabled.

III. THE ALJ'S DECISION

The ALJ denied benefits at Step Four. The ALJ mentioned Step Three, noting that "the evidence does not show the claimant has an impairment, or combination of impairments, which meets or equals the Listings, or that is functionally the equivalent to any listing." [R. at 13].

IV. REVIEW

When the ALJ held a hearing on this case and subsequently wrote his opinion, the applicable law was different than the current law. The problem created in this case is a result of the intervening change in the law. Due to the new statutes, children are considered disabled only if they meet or equal a "Listing." However, because the applicable law at the time of his decision was different, the ALJ did not discuss the Listings, in any detail, in his Order.

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equaled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51. Furthermore, in his decision, the ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).

As noted above, in this case, the ALJ merely stated that based on a review of the evidence, the claimant did not meet a Listing. This type of procedure is exactly

what the Court of Appeals for the Tenth Circuit was critical of in Clifton. In Clifton the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at step three, or even identify the relevant Listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. As in Clifton, the ALJ in this case did not discuss the medical evidence in connection with his step three conclusion, and did not identify any potentially applicable Listings. In Clifton, the Tenth Circuit held that this type of a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

The Tenth Circuit held as follows:

> Under the Social Security Act,
>
> > [t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.
>
> 42 U.S.C. 405(b)(1). . . .
>
> > This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her

> factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .
>
> In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

The Court believes that the change in the applicable law during the time period between the decision of the ALJ and the decision of this Court is responsible for the situation presented in this case. However, because no specific findings were made by the ALJ at Step Three, this Court is unable to review the Step Three decision and determine whether or not it was supported by substantial evidence.

The Court wishes to make clear that it is in no way expressing an opinion as to whether Plaintiff actually meets or equals a Listing. However, this Court lacks the authority to make such findings. Rather, this Court is limited to reviewing the findings made by the ALJ and the Commissioner and determining if those findings are supported by substantial evidence. Consequently, the Court is simply remanding this case to permit the ALJ an opportunity to discuss his conclusions in connection with

any applicable Listings. Only then can this Court review the ALJ's decision in connection with the Listing(s).

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

Dated this 30 day of September 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INDIANA GLASS COMPANY and LANCASTER COLONY CORPORATION,

Plaintiffs,

v.

INTERPACK & PARTITIONS, INC.,

Defendant.

Case No.: 97CV665K(J)

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the attorney for the Plaintiffs and the attorney for the Defendant, respectively, and hereby stipulate and agree that the above-captioned cause may, upon order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein and state that a compromise settlement covering all claims involved in the above-captioned cause has been made between the parties, and the said parties hereby request the Court dismiss said action with prejudice, pursuant to this stipulation.

Respectfully submitted,

Kerry K. Brown
ZELLE & LARSON
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Telephone: (214) 742-3000
Facsimile: (214) 760-8994
ATTORNEY FOR PLAINTIFFS

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Telephone: (405) 239-2500
Facsimile: (405) 235-4655
ATTORNEY FOR DEFENDANT

CERTIFICATE OF MAILING

I hereby certify that on this 1 day of October, 1998, a true and correct copy of the foregoing was mailed postage prepaid to:

John H. Tucker, Esquire
RHODES, HIERONYMUS, JONES,
TUCKER & GALE
P.O. Box 21100
Tulsa, Oklahoma 74121-1100

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

N.M. GOFF,

Plaintiff,

vs.

CITY OF TULSA, OKLAHOMA, a municipal corporation,

Defendant.

Case No. 97-CV-563-J

JUDGEMENT FOR THE PLAINTIFFS

Pursuant to the unanimous verdict of the jury, the Court hereby enters judgment for the Plaintiffs in the amount of $5,001.00.

IT IS SO ORDERED.

Dated this 1st day of October 1998.

Sam A. Joyner
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)
	)
NTC OF AMERICA, INC.	)
	)
Debtor,	)

JOHN H. WILLIAMS, Plan Trustee of NTC OF AMERICA, INC.,	) Case No. 97-CV-0819-H(E)
Appellant,	)
vs.	)
EMPIRE FIRE AND MARINE INSURANCE COMPANY and WESTPHALEN, BRADLEY & JAMES, INC.	)
Appellees.	)

STIPULATION OF DISMISSAL WITH PREJUDICE

JOHN H. WILLIAMS, JR., Plan Trustee of NTC OF AMERICA, INC., pursuant to the Order Confirming Debtor's Plan of Reorganization, filed January 2, 1996, and Appellant herein, pursuant to the Order of the Honorable Sven Erik Holmes, District Judge, filed herein July 22, 1998, and Appellees, EMPIRE FIRE AND MARINE INSURANCE COMPANY and WESTPHALEN, BRADLEY & JAMES, INC., hereby stipulate to the dismissal with prejudice of the referenced appeal in its entirety, and request entry of an Order of Dismissal with Prejudice of the referenced appeal and entry of this Stipulation and the Order of Dismissal with Prejudice of the Appeal on the docket

on the underlying adversary proceeding in the Bankruptcy Court for the Northern District of Oklahoma, No. 91-0221.

Respectfully Submitted,

MELINDA MARTIN, Counsel for John H. Williams, Jr., Plan Trustee for NTC of America, Inc.

JEFF C. GROTTA, Counsel for Westphalen, Bradley & James, Inc.

A. MARK SMILING, Counsel for Empire Fire and Marine Insurance Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD R. NICHOLS and VIRGINIA NICHOLS, Husband and Wife; CHARLES BUCK; JEFF TSAY and NORA TSAY, Husband and Wife; AL BRYSON and MARY BRYSON; and HOWARD COLLINS

Plaintiffs,

v.

G. DAVID GORDON; IRA RIMER; JOEL HOLT; PROGRESSIVE CAPITAL CORPORATION, an Oklahoma corporation; STRUTHERS STRUTHERS INVESTMENT ENTERPRISES; R. A. DEISON; GEORGE GORDON; SAMUEL LINDSAY, JR.; JAMES E. TURNER; BETTY ROSE TURNER; GLYN TURNER; PATTERSON ICENOGLE, INC., an Oklahoma corporation; DOUG NELSON; NORTHERN OHIO ENGINEERING CO., a foreign corporation; ROBERT L. MILLER; HENSHAW, KLENDA GORDON & GETCHEL, P.C., an Oklahoma professional corporation; and BAGGETT, GORDON & DEISON a partnership,

Defendants.

Case No. 95-C-1126-H

FILED

OCT - 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE 10/2/98

DISMISSAL WITH PREJUDICE

Jeff Tsay and Nora Tsay hereby dismiss their claims with prejudice, each party to bear their or its own costs.

Laurence L. Pinkerton

Laurence L. Pinkerton (OBA #7168)
Judith A. Finn (OBA #2923)
PINKERTON & FINN, P.C.
2000 First Place
15 East 5th Street
Tulsa, Oklahoma 74103-4367

CERTIFICATE OF SERVICE

I, Laurence L. Pinkerton, do hereby certify that on the 1st day of October, 199, I caused to be mailed a true and correct copy of the above and foregoing *Dismissal with Prejudice*, with postage thereon fully prepaid to:

William E. King, Esq.
WILLIAM E. KING, P.C.
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R. THOMAS SEYMOUR, ATTORNEYS
100 West Fifth Street, Suite 550
Tulsa, Oklahoma 74103

Laurence L. Pinkerton

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD R. NICHOLS and VIRGINIA NICHOLS, husband and wife,

Plaintiffs,

v.

G. DAVID GORDON, IRA RIMER, JOEL HOLT, PROGRESSIVE CAPITAL CORPORATION, an Oklahoma corporation, STRUTHERS INVESTMENT ENTERPRISE, R.A. DEISON, GEORGE GORDON, SAMUEL LINDSEY, JR., JAMES E. TURNER, BETTY ROSE TURNER, GLYN TURNER, NORTHERN OHIO ENGINEERING CO., a foreign corporation, ROBERT L. MILLER, and BAGGETT, GORDON & DEISON, a partnership,

Defendants.

Case No. 95-C-1126H

NOTICE OF DISMISSAL

Pursuant to Fed. R. Civ. P. 41(A)(1)(i), plaintiffs, Donald R. Nichols and Virginia Nichols, hereby dismiss *with prejudice* their claims against G. David Gordon, Joel Holt, Richard T. Clark, and Henshaw, Klenda, Gordon & Getchell, P.C. or its successor, Klenda, Gordon & Getchell, P.C.

Respectfully submitted,

Laurence L. Pinkerton

Laurence L. Pinkerton, Esq.
Judith A. Finn, Esq.
PINKERTON & FINN, P.C.
2000 First Place
15 East 5th Street
Tulsa, Oklahoma 74103-4367

Attorneys for Plaintiffs,
Donald R. Nichols and Virginia Nichols

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CERTIFICATE OF MAILING

I hereby certify that on the 1st day of October, 1998, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon, to:

William E. King
WILLIAM E. KING, P.C.
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Kemah, Texas 77565

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Christine D. Little
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R. Thomas Seymour
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R. THOMAS SEYMOUR, ATTORNEYS
100 West 5th Street, Suite 550
Tulsa, OK 74103

Laurence L. Pinkerton

/u/cnb/docs/gordon/not.dismiss

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JASON ROBERT SANDERS,

Plaintiff,

vs.

HAROLD BERRY, CHARLIE RICE, BRIAN KAMM, and MAYES COUNTY JAIL,

Defendants.

Case No. 97-CV-9-B

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motions for Summary Judgment, the Court hereby enters judgment in favor of Defendants Mayes County Jail [Mayes County], Harold Berry, Charlie Rice and Brian Kamm, and against Plaintiff Jason Robert Sanders. The parties are to pay their respective costs, and attorney fees, if any.

Dated, this 1ST day of October, 1998.

THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JASON ROBERT SANDERS,

Plaintiff,

vs.

HAROLD BERRY, CHARLIE RICE, BRIAN KAMM, and MAYES COUNTY JAIL,

Defendants.

Case No. 97-CV-9-B

ORDER

Before the Court are Defendants' Motions for Summary Judgment [Docket Nos. 17 and 25] and Defendants' Motion to Deem the Summary Judgment Motion Confessed [Docket No. 20]. For the reasons set forth below, the Court grants the motions.[1]

I. Procedural history and background

Plaintiff Jason Roberts Sanders ("Sanders") filed a civil right complaint on January 3, 1997.[2] In this complaint, Sanders alleges his First Amendment rights were violated when

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[1] At the Case Management Conference before Magistrate Judge Joyner on December 5, 1997, the parties consented to trial before the Magistrate Judge. Accordingly, on March 6, 1998, the Court directed that all further proceedings in this matter were to proceed before the Magistrate Judge with the right of appeal to the Tenth Circuit Court of Appeals. [Doc. No. 22]. However, at the pretrial conference before the Magistrate Judge on March 12, 1998, plaintiff withdrew his oral consent and refused to sign the form consenting to proceed before the Magistrate. Therefore, the Court addresses the pending motions.

[2] Apparently, Sanders filed several different civil rights complaint forms which the Court Clerk's office mistook as one complaint and copies. Only one civil rights complaint (alleging denial of visitation rights) was filed of record by the Court Clerk's office [Docket No. 1], and the remainder of the complaints returned to Sanders or served on defendants. Defendants received a civil rights complaint which differed from the one filed of record and which pertained to the alleged misuse of chemical spray. Once made aware of the mistake in filing by the Clerk's Office, the Court directed Sanders to file any additional complaint he wished to file. Sanders never filed any additional complaints. At the pretrial conference, defendants tendered the copy of the civil rights complaint which was mailed to them pertaining to the chemical spray incident, which the Court filed with the Clerk's Office, on behalf of Plaintiff, on March 12, 1998. [Docket No. 23]. Accordingly, this case consists of the initial complaint [Docket No. 1] and the subsequently filed complaint [Docket No. 23].

Defendants denied him visitation with his family and children for the five months prior to his filing his complaint. In his "second" complaint, Sanders asserts defendant Brian Kamm ("Kamm") violated his Fourteenth and Eighth Amendment rights by illegally spraying him with chemical spray. Sanders alleges in general that Mayes County jailers "constantly threaten inmates with the spray" and "spray when there is no need." Sanders' allegations of improper chemical spray use and denial of his visitation rights arise during the time he was imprisoned at Mayes County Jail. Therefore, Sanders brings these claims against defendants Mayes County Jail, Sheriff Harold Berry ("Berry"), in his individual and official capacity, and individual defendants, Kamm and Charlie Rice ("Rice").

On January 9, 1998, defendants filed a motion for summary judgment on the alleged chemical spray incident. [Docket No. 17]. Sanders did not file a response. Defendants filed a Motion to Deem the Summary Judgment Confessed on January 29, 1998. [Docket No. 20]. By Order dated March 5, 1998, the Magistrate Judge notified Sanders of the pending summary judgment motion and allowed him additional time, or until March 16, 1998, to file a response. [Docket No. 21]. At the pretrial conference on March 12, 1998, the Magistrate Judge granted Sanders an additional thirty (30) days to file his response. Sanders never filed a response. On July 27, 1998, defendants filed a second motion for summary judgment on the alleged deprivation of Sanders' visitation rights. [Docket No. 25]. Plaintiff has also failed to respond to this motion.

II. Undisputed Facts[3]

On July 10, 1996, Sanders was arrested pursuant to an arrest warrant on charges of homicide and armed robbery and booked into the Mayes County Jail. A jury found Sanders guilty of murder in the first degree on March 10, 1997 and he was sentenced to life without parol. On March 20, 1997, Sanders was transferred from the Mayes County Jail to the Lexington Assessment and Reception Center ("LARC") to serve the remainder of his sentence.

While at the Mayes County Jail, Sanders shared a cell with inmate Kevin Looney ("Looney"). On September 19, 1996, during a jail check, Kamm and dispatcher Linda Harris heard Looney banging on his cell door. They warned Looney that he would be sprayed with chemical spray if he did not stop banging the door. Kamm and Ms. Harris went downstairs to continue the jail check and heard banging from upstairs. They returned to Looney's cell and ordered him to stop banging on his cell door. Looney denied banging on the door and began swearing at Kamm and Ms. Harris. Kamm sprayed a one-to-two second burst of chemical spray into Looney's face.

Mayes County Jail follows the Oklahoma State Department of Health, Special Health Services, Jail Standards. *Ex. E, Jail Standards, Section 310:670-5-2; Ex. F, Sheriff's Office Policies and procedures, Section 310:670-5-2.* In compliance with these standards, the jail administrator has the authority to use or authorize the use of chemical agents for security and

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[3/] Pursuant to Local Rule for the Northern District of Oklahoma, Rule 7.1, failure to respond to a motion for summary judgment authorizes the Court to deem the matters confessed. Sanders was given several opportunities to respond to defendants' motions for summary judgment, including two extensions of time to respond, and was specifically warned by the Magistrate Judge that failure to respond may result in the Court deciding the motion on its merits without benefit of his response. *See Order dated March 5, 1998.* Still, Sanders failed to respond to either motion. Thus, pursuant to Local Rule 7.1 and on defendants' motion, the Court deems defendants' statement of undisputed facts regarding the chemical spray incident confessed.

control purposes. Mayes County Sheriff's Office uses a spray called Oleoresin Capsisum ("Capstum") for these purposes. Kamm attests that Capstum is used because of its quality chemical makeup and its ability to subdue a person without damaging the skin and thereby preventing the need for greater physical intervention.

III. Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

IV. Analysis

Section 1983 of title 42 of the United States Code provides a federal remedy to an individual for the deprivation of the individual's rights secured by the Constitution and laws of the United States. *See Dixon v. City of Lawton*, 898 F.2d 1443, 1447 (10th Cir. 1990). To state a §1983 claim, plaintiff must allege two prima facie elements: (1) the defendant deprived him of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under color of state law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). The Court addresses the merits of Sanders' two §1983 claims in turn.

A. Claims against Mayes County[4] and Sheriff Berry, in his official capacity, and for denial of visitation

Sanders alleges defendants illegally denied him visitation with his wife and children for five months in violation of his constitutional rights. A prisoner, however, has no associational right to receive visitors under the First Amendment. *Jones v. North Carolina Prisoners' Labor*

[4/] As a preliminary matter, defendants contend Sanders cannot sue the "Mayes County Jail" as it is not a legal entity. The determination of whether or not an entity is a legal entity subject to suit is based upon the law of the state in which the entity is located. Defendants cites no Oklahoma law to determine whether Mayes County Jail is or is not a legal entity.

The Court liberally construes *pro se* pleadings. *See Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). The Court concludes that although Sanders named Mayes County Jail as defendant, the legal entity he intended to sue is Mayes County. This holding, however, does not change the posture of this lawsuit as Sanders brings both §1983 claims against Sheriff Berry in his official capacity, which in legal effect, are claims against Mayes County.

Union, Inc., 433 U.S. 119, 125-26 (1977). Furthermore, the due process clause of the Fourteenth Amendment does not give an inmate an "unfettered" right to visitation. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460-61 (1989). Any due process right an inmate might have in visitation must come from a state-created liberty interest, and such interest exists only when the punishment is an "atypical" situation which imposes "significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 483-85 (1995).

The Sixth, Ninth, and Tenth Circuits have all held, in unpublished opinions, that a denial or restriction of visitation does not implicate an inmate's liberty. *Abad v. Furlong*, 103 F.3d 144, 1996 WL 693057 (10th Cir.1996)(loss of visitation rights fails to provide a basis for a federal constitutional claim);*Dever v. Turner*, 99 F.3d 1138, 1996 WL 603670 (6th Cir.1996) (denial of visitation does not impose an atypical and significant hardship on an inmate in relation to the ordinary incidents of prison life); *Barnes v. Vernon*, 995 F.2d 230, 1996 WL 367628 (9th Cir.1993) (same). Each of these circuit courts have determined that no liberty interest is implicated because the denial of visitation does not result in an atypical and burdensome restriction in relation to ordinary incidents of prison life. Persuaded by this authority, the Court finds Sanders has failed to establish the first element of his prima facie case, and accordingly grants Defendants' Motion for Summary Judgment with respect to Sander's denial of visitation claim.

B. Qualified Immunity Defense

Plaintiff's second complaint pertaining to the alleged illegal use of chemical spray is asserted against individual defendants Berry, Rice, and Kamm. Defendants contend that Plaintiff's claim against each of these individuals is barred by the doctrine of qualified immunity.

Under the doctrine of qualified immunity, a defendant cannot be held personally liable unless the plaintiff can establish that the defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). *See also Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir.1988). When the qualified immunity defense is raised in a motion for summary judgment, Plaintiff must show (1) the defendant's alleged conduct violates the law, and (2) the law was clearly established at the time of the alleged unlawful conduct. *Cummins v. Campbell*, 44 F.3d 847, 850 (10th Cir.1994); *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir.1995). If Plaintiff fails to meet either part of this burden, Defendant is entitled to qualified immunity. *Albright*, 51 F.3d at 1535; *Thompson v. City of Lawrence*, 58 F.3d 1511, 1515 (10th Cir.1995).

"The key to the inquiry is the 'objective reasonableness' of the official's conduct in light of the legal rules that were 'clearly established' at the time the action was taken." *Melton v. City of Oklahoma City*, 879 F.2d 706, 727 (10th Cir.), *reh'g granted in part*, 888 F.2d 724 (1989). It is not sufficient that the right at issue be clearly established at a general level. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). For the law to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly

established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

"Although pretrial detainees are protected under the Due Process Clause of the Fourteenth Amendment, the Eighth Amendment standards applicable to convicted persons provide the benchmark in this case." *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1022 (10th Cir. 1996) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979)). For the use of chemical spray to rise to the level of an Eighth Amendment violation, Sanders must establish the defendants "acted maliciously and sadistically for the very purpose of causing harm rather than in a good-faith effort to maintain or restore discipline." *Mitchell v. Maynard*, 80 F.3d 1433, 1440 (10th Cir. 1996) (citing *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992)). In making this determination, the Court must balance the need for force against the amount of force used. *Hudson*, 503 U.S. at 7. This standard "applies regardless of whether the corrections officers are quelling a prison disturbance or merely trying to maintain order." *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992). The absence of serious injury is a relevant, but not dispositive factor to be considered in the subjective analysis. *Hudson*, 503 U.S. at 7.

Neither the Supreme Court nor a court of appeals has held it is "per se unconstitutional for guards to spray mace [or other chemical agents, such as chemical gas,] at prisoners confined in their cells." *Williams v. Benjamin*, 77 F.3d 756, 763 (4th Cir. 1996). However, "[i]t is generally recognized that 'it is a violation of the Eighth Amendment for prison officials to use mace, tear gas or other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain.'" *Williams*, 77 F.3d at 763 (4th Cir. 1996) (quoting *Soto v. Dickey*, 744 F.2d 1260, 1270 (7th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985). The appropriate use of

chemical agents depends on "the 'totality of the circumstances, including the provocation, the amount of gas used, and the purposes for which the gas is used.'" *Williams*, 77 F.3d at 763 (quoting *Bailey v. Turner*, 736 F.2d 963, 969 (4th Cir.1984). Courts which sanction the use of chemical agents in small quantities to control unruly inmates generally rely on the following reasoning:

> When an order is given to an inmate there are only so many choices available to the correctional officer. If it is an order that requires action by the institution, and the inmate cannot be persuaded to obey the order, some means must be used to compel compliance, such as a chemical agent or physical force. While experts [may] . . . suggest[] that rather than seek to enforce orders, it [is] possible to leave the inmate alone if he chooses not to obey a particular order, and wait him out, experience and common sense establish that a prison cannot be operated in such a way.

Soto, 744 F.2d 1260, 1267.

Applying the above constitutional standards to the case at bar, the Court finds Sanders has failed to establish the violation of his constitutional rights under the particular factual situation presented. First, there is no evidence that Berry or Rice participated in the alleged chemical spray incident. Further, Kamm attests he "sprayed a one-to-two second burst of chemical spray into Looney's [Sanders' cell mate's] face" after Looney refused Kamm's repeated demand that Looney stop banging the door. Sanders did not file a response disputing this statement of fact. As defendants' statements of undisputed facts are deemed confessed, the Court concludes such does not rise to a violation of Sanders' constitutional rights. *See Smith v. Iron County*, 692 F.2d 685 (10th Cir. 1982) (affirming summary judgment that jailor's use of mace did not violate detainee's constitutional rights under the circumstances, although plaintiff alleged he "was initially sprayed in the face for approximately two minutes, and again for three minutes in the

back of the head when he refused to respond to another question"); *Bethea v. Crouse*, 417 F.2d 504 (10th Cir.1969) (affirming dismissal of complaint alleging prisoner was sprayed in his face with tear gas as "it was a purely disciplinary measure and, moreover, taking the prisoners' version, no reasonable man would say that it amounted to cruel and unusual punishment"); *Spain v. Procunier*, 600 F.2d 189, 195-96 (9th Cir. 1979)("[U]se of the substance in small amounts may be a necessary prison technique if a prisoner refuses after adequate warning to move from a cell or upon other provocation presenting a reasonable possibility that slight force will be required.").

C. Claims against Mayes County and Sheriff Berry, in his official capacity, for chemical spray incident

Under §1983, a local government may be held liable for the constitutional violations of its employees only when the plaintiff can establish (1) the existence of a local government custom or policy and (2) a direct causal link between the custom or policy and the alleged violation. *Jenkins v. Wood*, 81 F.3d 988, 993-94 (10th Cir. 1996)(*citing City of Canton v. Harris*, 489 U.S. 378, 385 (1989)). Sanders complains of a single incident in which he was allegedly sprayed with chemical spray, but does not reference a policy, custom, or procedure of Mayes County. The Court, therefore, finds defendants Mayes County Jail [Mayes County] and Sheriff Berry, in his official capacity, are entitled to summary judgment on Sanders' claim arising from the chemical spray incident.

IV. Conclusion

In accordance with the findings above, the Court grants defendants' motions for summary judgment [Docket Nos. 17 and 25] and defendants' Motion to Deem the Summary Judgment Motion Confessed [Docket No. 20].

IT IS SO ORDERED, this 15th day of October, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RELIASTAR LIFE INSURANCE COMPANY,

Plaintiff,

vs.

JIMMY L. WEST and GLORIA SANCHEZ

Defendants.

Case No. 97-C-673-B

JUDGMENT

In accord with the Order filed this date sustaining the Defendant Gloria Sanchez's Motion for Summary Judgment, the Court hereby enters judgment in favor of Defendant Gloria Sanchez and against Defendant Jimmy L. West. The Court directs the Court Clerk to disburse the funds on deposit in the registry of the Court in this interpleader action to defendant Gloria Sanchez, in care of her attorney, in the amount of principal plus interest, less the appropriate registry fee at the next renewal date.

Costs are hereby assessed against Defendant Jimmy L. West, if timely applied for pursuant to Local Rule 54.1. Any claim for attorney's fees must be timely filed pursuant to Local Rule 54.2.

Dated, this 1st day of October, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RELIASTAR LIFE INSURANCE COMPANY,

Plaintiff,

vs.

JIMMY L. WEST and GLORIA SANCHEZ

Defendants.

Case No. 97-C-673-B

ORDER

Before the Court is the motion for summary judgment filed by defendant Gloria Sanchez ("Sanchez"). (Docket No. 17).

Plaintiff Reliastar Life Insurance Company ("Reliastar") filed this action to implead defendants' claims to proceeds of two insurance policies. In her answer, Sanchez brought a cross-claim against Defendant, Jimmy L. West ("West") claiming that she is the named beneficiary of decedent Gloria West's Accidental Death and Disability Insurance ("AD&D") and optional supplemental life insurance policy ("Supplemental Insurance"). Although West answered the complaint in interpleader, he did not file an answer to Sanchez's cross-claim for the insurance proceeds. Sanchez now moves for summary judgement on her claim. West failed to respond to the summary judgment motion and also failed to appear at the scheduled pretrial conference on September 3, 1998.

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Undisputed Facts

On July 5, 1994, Gloria West was employed by Simmons Foods, Inc. On the same day, she completed an Employee Enrollment form, naming her husband, West, as the beneficiary of the AD&D Insurance and Supplemental Insurance policies. Thereafter, Ms. West separated from her husband and moved into her own apartment. On June 28, 1996, Ms. West completed and signed another Employee Enrollment Form ("Amended Enrollment form") by which she designated her mother, Gloria Sanchez, as the named beneficiary. *Defendant Sanchez's Motion For Summary Judgment and Default, Exhibit "H"*. At the top of the Amended Enrollment form, the "Yes" box is checked under the election for AD&D Insurance. And the "Yes" box is also checked under the election for Supplemental Life Insurance. On the same form, Ms. West signed a section specifically authorizing her employer to deduct an amount from her paycheck to cover the cost of her Supplemental Insurance. Sanchez was the only named beneficiary on the Amended Enrollment form.

On August 1, 1996, Ms. West filed a Petition for Divorce. *Defendant Sanchez's Motion For Summary Judgment and Default, Exhibit "B"*. On August 9, 1996, Ms. West was killed in an automobile accident. Subsequently, Sanchez filed a death claim as the named beneficiary of both the AD&D and Supplemental Insurance policies. On August 21, 1996, West filed a death claim as the beneficiary of only the Supplemental Insurance policy. On July 22, 1997, Plaintiff Reliastar initiated this action by filing a complaint in interpleader.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

Analysis

Sanchez asserts she is entitled to the proceeds of both the AD&D and the Supplemental Insurance policy because the Amended Enrollment form unambiguously names her as the beneficiary of both policies. The Court agrees.

Absent ambiguity, the "intent of parties must be derived solely from the language of the insurance contract." *Mic Property and Cas. Ins. Corp. v. International Ins. Co.*, 990 F.2d 573, 575 (10th Cir. 1993); *Hercules Cas. Ins. Co. v. Preferred Risk Ins. Co.*, 337 F.2d 1,3 (10th Cir. 1964)("where the language of a policy is unambiguous, there is no room for construction"). Under Oklahoma law, "[t]he terms of the parties' contract, if unambiguous, clear, and consistent, are accepted in their plain and ordinary sense, and the contract will be enforced to carry out the intention of the parties as it existed at the time the contract was negotiated." *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla.1991). The determining factor of interpretation is to carry out the intent of the parties. *Torres v. Kansas City Fire and Marine Ins. Co.*, 849 P.2d 407, 411 (Okla. 1993).

The Amended Enrollment form is clear and ambiguous. The Amended Enrollment form clearly provides for the employee to elect one or both AD&D and Supplemental Insurance by checking the appropriate box or boxes. Ms. West checked the boxes for both insurance policies and identified only one named beneficiary, her mother, Sanchez. Furthermore, at the time Ms. West completed the form she had separated from her husband, West, and had filed for divorce. Under these circumstances and given the clear and unambiguous terms of the Amended Enrollment form, the Court finds Ms. West intended to name Sanchez as beneficiary of both insurance policies.

Accordingly, the Court grants Defendant Sanchez's Motion for Summary Judgment (Docket No. 17).[1]

IT IS SO ORDERED, this 15th day of October, 1998

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1]In her motion, defendant Sanchez also moved for a default judgment against defendant West. Because the Court grants Sanchez's Motion for Summary Judgment, the motion for default judgment is moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMOCO CORPORATION,

Plaintiff,

v.

LANDMARK GRAPHICS CORPORATION,

Defendant.

Case No. 97-CV-450-H

ENTERED ON DOCKET

DATE 10-2-98

ADMINISTRATIVE CLOSING ORDER

The parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within 120 days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that 120-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 30TH day of September, 1998.

Sven Erik Holmes
United States District Judge

30

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVERETT R. WAGONER and MADELINE WAGONER,

Plaintiffs,

v.

THE GRAND RIVER DAM AUTHORITY, et al.,

Defendants/Third Party Plaintiffs,

v.

UNITED STATES OF AMERICA ex rel FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Third Party Defendants,

v.

WAYNE E. ROBERTS,

Plaintiff,

v.

THE GRAND RIVER DAM AUTHORITY, et al.,

Defendants/Third Party Plaintiffs,

v.

UNITED STATES OF AMERICA ex rel FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Third Party Defendants,

v.

Case No. 94-C-1091-H

70

JACK DALRYMPLE, et al.,

Plaintiffs,

v.

THE GRAND RIVER DAM AUTHORITY, et al.,

Defendants/Third Party Plaintiffs,

v.

UNITED STATES OF AMERICA ex rel FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Third Party Defendants.

ADMINISTRATIVE CLOSING ORDER

The Joint Status Report filed by the parties stipulates that litigation in this Court has been disposed of pursuant to a May 28, 1998, Order of the United States Court of Appeals for the Tenth Circuit, which dismissed the Defendants/Third Party Plaintiffs' appeal of this Court's remand orders and affirmed this Court's dismissal of the Defendants/Third Party Plaintiffs' complaints against the Third Party Defendants. It is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within thirty days of the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 30TH day of September, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROGER M. WHELESS,

Plaintiff,

v.

WILLARD GRAIN & FEED, INC.,

Defendant.

No. 97-CV-25-H

ORDER

This matter comes before the Court on the status hearing held in this action on February 6, 1998. Pursuant to the agreement of the parties at that hearing, the Court certified a question of law to the Oklahoma Supreme Court on February 23, 1998. The Oklahoma Supreme Court has answered the certified question, in an opinion dated July 14, 1998, finding that Plaintiff cannot maintain a viable cause of action as a matter of law for wrongful termination in violation of the public policy of the State of Oklahoma pursuant to the facts presented to the Court by the motion for summary judgment. The Court, in its July 16, 1998, order, directed Plaintiff to file a pleading with this Court, within ten days of the file date of the order, advising why this matter should not now be dismissed. Plaintiff has not filed his pleading, thus failing to obey the Court's order.

Rule 41(b) of the Federal Rules of Civil Procedure allows the Court to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." See also Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir.1976) (stating that a court has inherent authority to dismiss for failure to prosecute). Plaintiff has not complied with the Court's order directing Plaintiff to file his pleading. Thus, Plaintiff's action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 30TH day of September, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY N. McBEATH;
DAVID A. SCOTT;
A-1 COMMUNICATIONS, an Oklahoma general partnership,

Plaintiffs,

v.

UNITED STATES OF AMERICA ex. rel. INTERNAL REVENUE SERVICE,

Defendant.

Case No. 97-CV-649-H

ADMINISTRATIVE CLOSING ORDER

This matter comes before the Court on Plaintiffs' Uncontested Motion to Stay All Proceedings due to Settlement Negotiations filed September 25, 1998. The parties having entered into settlement negotiations, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within sixty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that sixty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 30th day of September, 1998.

Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff,

v.

LOUIS B. GRANT, JR., *et al.*,

Defendants.

No. 92-CV-1043-H(J)

REPORT AND RECOMMENDATION [1/]

The following motion has been referred to the undersigned for report and recommendation: Plaintiff's Motion to Strike And Motion to Dismiss Counterclaim of Defendant Louis W. Grant, Jr. [Doc. No. 300-1 and 300-2]. Mr. Grant's Counterclaim was filed on March 22, 1996. [Doc. No. 291]. Plaintiff moves to strike Mr. Grant's Counterclaim under Fed. R. Civ. P. 12(f) and, in the alternative, to dismiss Mr. Grant's Counterclaim under Fed. R. Civ. P. 12(b)(6). For the reasons discussed below, the undersigned recommends that Plaintiff's motion be **DENIED**.

I. INTRODUCTION

On November 16, 1989, Sooner Federal Savings & Loan Association ("Sooner") was declared insolvent and closed by the Office of Thrift Supervision ("OTS"). The Resolution Trust Corporation ("RTC") was appointed as Sooner's receiver. The Federal

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[1/] See 28 U.S.C. § 636; Fed. R. Civ. P. 72; and N.D. LR 72.1.

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Deposit Insurance Corporation ("FDIC") statutorily succeeded the RTC as Sooner's receiver on January 1, 1996. See 12 U.S.C. § 1441a(m)(1) and (2).

Mr. Grant is a former member of Sooner's board of directors. On April 10, 1990, Mr. Grant submitted a claim to the RTC, as Sooner's receiver, for $536,249.61. Mr. Grant alleges that Sooner owes him the money as a result of a May 1, 1983 supplemental retirement income agreement. See Exhibit 1 to Mr. Grant's Counterclaim. The FDIC, as the RTC's successor, denied Mr. Grant's claim in part and granted it in part on January 25, 1996. The FDIC calculated the present value of the income stream provided for in the supplemental retirement income agreement and allowed Mr. Grant's claim to the extent of the present value only. Id. Mr. Grant's Counterclaim seeks judicial review of the FDIC's partial disallowance of his claim.

II. MOTION TO STRIKE UNDER FED. R. CIV. P. 12(f)

The FDIC argues that Mr. Grant's Counterclaim should be stricken because when it was filed Mr. Grant had not yet filed an answer. The undersigned does not agree.

When Mr. Grant filed his Counterclaim, he had not yet filed an answer because he himself had a motion to dismiss pending under Fed. R. Civ. P. 12(b)(6). Rule 12(a)(4)(a) provides that an answer need not be filed until 10 days after a Rule 12(b)(6) motion has been ruled on. Thus, when Mr. Grant filed his Counterclaim, he was not required to file an answer. Mr. Grant filed his Counterclaim when he did to avoid the 60-day time bar provided in 12 U.S.C. § 1821(d)(6)(A). The FDIC's argument is, however, now moot because Mr. Grant has since filed an answer. See

Doc. No. 353. Thus, the undersigned recommends that the FDIC's motion to strike be denied.

III. MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

The FDIC argues that Mr. Grant's Counterclaim fails to set forth a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). The FDIC's claim is without merit.

The FDIC, as Sooner's receiver, has the right to determine claims filed against Sooner after receivership. See 12 U.S.C. § 1821(d)(3)-(5). The statute also specifically provides for judicial review of a claim determined by the FDIC. Id. at § 1821(d)(6). The letter attached to Mr. Grant's Counterclaim itself specifically directs Mr. Grant to file an action in a federal district court within 60 days if he wishes to challenge the FDIC's determination of his claim. Mr. Grant has exercised that option and has filed a Counterclaim requesting this Court to review the FDIC's disallowance of the full value of the income stream represented in his May 1, 1983 supplemental retirement income agreement with Sooner. Mr. Grant's Counterclaim states a proper claim for administrative review of the FDIC's determination. Thus, the undersigned recommends that the FDIC's motion to dismiss be denied.

Mr. Grant's Counterclaim is, however, not significantly related to the claims brought by the FDIC in this case. The undersigned recommends, therefore, that Mr. Grant's Counterclaim be severed from the rest of the claims at issue in this litigation and that Mr. Grant's Counterclaim receive a separate trial. See Fed. R. Civ. P. 42(a).

RECOMMENDATION

The undersigned recommends that the FDIC's motion to strike or, in the alternative, motion to dismiss Mr. Grant's Counterclaim be denied.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 30 day of September 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILMA E. YOUNG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 98-CV-0174H (E)** ✓
	)	
KW FURNITURE COMPANY,	)	ENTERED ON DOCKET
	)	
Defendant.	)	DATE OCT 1

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

It is hereby stipulated by Plaintiff and Defendant that the above-entitled cause be dismissed without prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

So stipulated this 29 day of September, 1998.

Respectfully submitted,

SNEED LANG, P.C.

By: Brian S. Gaskill

Brian S. Gaskill, OBA #3278
2300 Williams Center Tower II
Two West Second Street
Tulsa, OK 74103-3136
918-583-3145 (Telephone)
918-582-0410 (Facsimile)
ATTORNEY FOR DEFENDANT

By: Paula R. Inman

Paula R. Inman
616 South Main, Ste. 214
Tulsa, OK 74119
ATTORNEY FOR PLAINTIFF

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275-7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DALE JEAN TERWILLIGER, on behalf of herself and all other employees of HOME OF HOPE, INC. similarly situated,

Plaintiff,

vs.

HOME OF HOPE, INC.,

Defendant.

FILED
SEP 30 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-~~1024H~~ 1042

ENTERED ON DOCKET
DATE OCT 1 1998

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff, Kenneth Cobb and Defendant, Home of Hope, Inc., and pursuant to Fed. R. Civ. Proc. 41(a)(1), hereby stipulate to the voluntary dismissal of the above-referenced action by Plaintiff Kenneth Cobb, without prejudice.

DATED this 30 day of September, 1998.

Respectfully submitted,

BEST & SHARP

Terry S. O'Donnell, OBA #13110
Karen M. Grundy, OBA #14198
100 W. 5th St., Suite 808
Tulsa, OK 74103-4225
(918) 582-1234
Facsimile: (918) 585-9447

ATTORNEYS FOR DEFENDANT

Gerald R. Lee, OBA #5335
117 South Adair
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Pryor, OK 74362
(918) 825-2233
Facsimile: (918) 825-6613

ATTORNEY FOR PLAINTIFFS

275-7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DALE JEAN TERWILLIGER,
on behalf of herself and all other
employees of HOME OF HOPE, INC.
similarly situated,

Plaintiff,

vs.

HOME OF HOPE, INC.,

Defendant.

Case No. 96-CV-~~1024~~1042H

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff, Trina Bowlin and Defendant, Home of Hope, Inc., and pursuant to Fed. R. Civ. Proc. 41(a)(1), hereby stipulate to the voluntary dismissal of the above-referenced action by Plaintiff Trina Bowlin, without prejudice.

DATED this 30 day of September, 1998.

Respectfully submitted,

BEST & SHARP

Terry S. O'Donnell, OBA #13110
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ATTORNEY FOR PLAINTIFFS

STC 4/24/98

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 98CV0256C(E)
	)	
MELVIN GOREE,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE OCT 01 1998

O R D E R

Upon the motion of the plaintiff, United States of America, to which there is no objection, it is hereby **ORDERED** that all claims against defendant **Melvin Goree**, be dismissed without prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 30 day of Sept., 1998.

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

LFR/llf

4

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

PHILLIP GALE HILL and KIMBERLY GAIL HILL,

Debtors.

GENE MARITAN,

Appellant,

vs.

KENNETH V. TODD,

Appellee.

FILED

SEP 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-750-E(J)

ENTERED ON DOCKET

DATE OCT 01 1998

ORDER

Now before the Court is Appellant's appeal from an Order entered by Bankruptcy Judge Stephen Covey imposing sanctions against Kenneth V. Todd under Fed. R. Bankr. P. 9011. This matter was referred to Magistrate Judge Sam Joyner for report and recommendation pursuant to 28 U.S.C. § 636(b). Magistrate Judge Joyner recommended that Judge Covey's sanction order be affirmed. Appellant has not filed an objection to the Magistrate's Report and Recommendation pursuant to Fed. R. Civ. P. 72(b).

The Court has conducted a *de novo* review of the issues raised in Appellant's notice of appeal and hereby adopts Magistrate Judge Joyner's Report and Recommendation in its entirety. Judge Covey's order imposing sanctions against Kenneth V. Todd is affirmed.

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IT IS SO ORDERED.

Dated this 30th day of Sept. 1998.

James O. Ellison
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY D. SCOTT,

Plaintiff,

vs.

ELECTRICAL POWER SYSTEMS, INC., a Missouri corporation, VBF, INC., an Oklahoma corporation; and ADDISON FRED SMITH, an individual,

Defendants.

Case No. 97-CV-1114-BU

ORDER

This matter came before the Court for a telephone conference on September 30, 1998 upon Plaintiff's Motion for Leave to File Response Brief Out of Time. Although the Court had permitted Kay Bridger-Riley to withdraw from the case on September 14, 1996, she filed the instant motion on behalf of Plaintiff on belief that she was required to by the Court's Minute Order of September 17, 1998. The Court advised Ms. Bridger-Riley that she was not required to file the motion and she requested that the motion be withdrawn. The Court granted the oral motion to withdraw.

On September 14, 1998, this Court ordered Plaintiff to appear by counsel or in forma pauperis by September 28, 1998. The Court advised Plaintiff that failure to so appear may result in a dismissal of this case without prejudice. On September 17, 1998, Defendant filed a Motion to Dismiss and the Court directed Plaintiff to respond to the motion. Plaintiff has not complied with either the September 14, 1998 Order or the September 17, 1998

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Minute Order.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Leave to File Response Brief Out of Time is WITHDRAWN and that Plaintiff's action against Defendants, Electrical Power Systems, Inc., VBF, Inc. and Addison Fred Smith is DISMISSED WITHOUT PREJUDICE.

ENTERED this 30th day of September, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES DAVID KIEHN,)
)
Plaintiff,)
)
vs.) Case No. 97-CV-902-J
)
ROBERT LEE KIEHN, *et al.*,)
)
Defendants.)

ORDER

Now before the Court is a motion to dismiss this case filed by Defendants, Robert Lee Kiehn, Geraldine Kiehn and Paul Kiehn. Defendants move to dismiss Plaintiff's amended complaint for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). In the alternative, Defendants move for summary judgment on Plaintiff's claims. See Fed. R. Civ. P. 56. The Court has reviewed Plaintiff's amended complaints as to all defendants and finds that this action should be dismissed. Defendants' motion to dismiss is, therefore, **GRANTED**.

The Court has construed Plaintiff's amended complaints liberally. See Doc. Nos. 1, 5 and 9. Despite this liberal construction the Court finds that all of Plaintiff's claims are subject to being dismissed for at least one of the following reasons: (1) the Court lacks subject matter jurisdiction over the claim, (2) the Court lacks personal jurisdiction over the defendant against whom the claim is asserted, (3) the individual defendant against whom the claim is asserted would enjoy qualified immunity, (4) the governmental defendant against whom the claim is asserted would enjoy Eleventh

Amendment and/or sovereign immunity, (5) Plaintiff has failed to exhaust his remedies in connection with the claim asserted, (6) the Court lacks venue over the claim, (7) the claim is barred by the statute of limitations, (8) Plaintiff has failed to comply with the Governmental Torts Claims Act in connection with the claim, and/or (9) the claim is not one upon which relief can be granted. All claims in Plaintiff's amended complaints are, therefore, dismissed.

IT IS SO ORDERED this 20 day of September 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMMY J. MILLER,
SSN: 447-46-9184,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-848-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 30th day of Sept., 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SAMMY J. MILLER,
447-46-9184

Plaintiff,

vs.

Case No. 97-CV-848-M

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ORDER

Plaintiff, Sammy J. Miller, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits. In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

Plaintiff's December 21, 1992, applications for disability benefits were denied. The denial was appealed to the district court. The court "reluctantly remand[ed] this case for further review by the ALJ and additional vocational expert testimony after claimant's VA records have been obtained." [R. 294]. Following remand, a supplemental hearing before an Administrative Law Judge ("ALJ") was held March 11, 1997. By decision dated April 24, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 14, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992). Applying this standard, the Court reverses and remands the denial decision.

Plaintiff was born September 26, 1947, and was 49 years old at the time of the hearing. He has a 12 grade education and formerly worked as a welder's helper and railroad brakeman. He claims to have been unable to work since March 28, 1991, as a result of cervical and lumbar spine condition, mental problems, arthritis, muscle spasms, heart problems, alcoholism and anxiety. The ALJ determined that although Plaintiff is unable to perform his past relevant work, he is capable of performing light

work involving simple unskilled tasks with minimal contact with the general public. [R. 265-70]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. [R. 269-71]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to properly consider the evidence regarding his mental impairments; (2) failed to properly evaluate Plaintiff's credibility with regard to his mental impairment; (3) failed to support his findings recorded on the Psychiatric Review Technique form ("PRT") with references to evidence in the record; and (4) failed to accord weight to the Veterans Administration disability rating.

The ALJ outlined the treatment records for Plaintiff's mental impairment, accurately noting that although Plaintiff was hospitalized at Eastern State Hospital in 1983 for a few days to be evaluated pursuant to court order, subsequent medical records do not indicate mental health treatment. Plaintiff was referred only for treatment of his alcohol abuse, which he declined. [R. 131]. Anti-depressant medication was prescribed. The Court notes that there are only scattered objective observations related to Plaintiff's mental capacity, mostly related to his alcohol abuse and none indicating an inability to work.

A consultative psychiatric evaluation was performed on March 24, 1993, by Dr. David B. Dean. He found Plaintiff to have a generalized anxiety disorder, chronic, moderate in severity; major depression, chronic, moderate in severity; polysubstance abuse, currently in remission; and moderate chronic alcohol abuse. [R. 160-61]. The ALJ took note of the information in the record concerning Plaintiff's mental impairments and limited his residual functional capacity ("RFC") to work involving simple unskilled tasks with minimal contact with the general public. The Court finds that the ALJ properly considered the evidence regarding Plaintiff's mental impairments.

The Court also finds that the ALJ properly evaluated Plaintiff's credibility concerning his mental impairment. The ALJ is prohibited from summarily concluding that a claimant is not credible without a detailed analysis. *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995). The ALJ is required to closely and affirmatively tie his credibility findings to substantial evidence, and must indicate his credibility choices and the basis for those choices in resolving the truthfulness of a claimant's subjective symptoms. *Id.*

The ALJ concluded that "the symptomatology experienced by the claimant is limiting but, when compared with the total evidence, not severe enough to preclude all types of work." [R. 267]. In coming to that conclusion, the ALJ noted "troubling inconsistencies in the claimant's testimony and statements when compared to the medical evidence of record and other required factors of evaluation." *Id.* Plaintiff focuses his appeal only on the ALJ's analysis of his mental condition, however, the ALJ's decision addressed both Plaintiff's physical and mental impairments. The ALJ

did not specifically compare Plaintiff's statements concerning his mental status to the record but he did point to several examples to demonstrate why he found Plaintiff to be less than fully credible. The ALJ compared: Plaintiff's claims with respect to asthma with absence of such complaints in the medical records; and his allegation of arthritis with the absence of a such a diagnosis. He also discussed the difference between Plaintiff's testimony concerning a heart attack and the fact that a myocardial infarction was ruled out and Plaintiff was advised to pursue evaluation through the VA for an alternative etiology of his symptoms. And, the ALJ discussed Plaintiff's allegations of severe intractable neck and back pain in the context of having an essentially full range of motion. [R. 287-68]. The ALJ did not specifically discuss Plaintiff's lack of treatment for mental problems within his credibility analysis, although he did elsewhere in the decision. [R. 264].

On review of the record, the Court notes that there is a discrepancy similar to the ones the ALJ discussed between Plaintiff's testimony and the complaints voiced to Dr. Dean, the psychiatric consultative examiner. Dr. Dean recorded the fairly detailed history Plaintiff gave him including a life-long history of anxiety, a nervous breakdown with the death of his father, and an abortive suicide attempt as a young adult. [R. 159]. There was, however, no mention of flashbacks occurring daily, paranoia, or the nightmares that Plaintiff testified would keep him from working. Dr. Dean found that although Plaintiff was distant and aloof during the examination and tearful throughout part of it, he was well-grounded in current external reality and

demonstrated no unusual behavior. He found no evidence of auditory or visual hallucinations and no evidence of delusional thinking. [R. 160].

The Court notes that the ALJ did not entirely discount Plaintiff's allegations of mental impairment. The ALJ stated: "Given the objective medical evidence in the record, the Administrative Law Judge finds that the claimant's residual functional capacity is reasonable, and that the claimant could function within those limitations without experiencing significant exacerbation of his symptoms." [R. 268]. The RFC finding that Plaintiff was limited to doing simple unskilled tasks with minimal contact with the general public largely takes into account Plaintiff's testimony concerning his inability to concentrate and preference for keeping to himself. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). Viewing the record as a whole, the Court finds that the ALJ evaluated the record and Plaintiff's credibility in accordance with the correct legal standards established by the Commissioner and the courts.

However, the Court is convinced that the ALJ's decision should be reversed because the ALJ failed to link the findings recorded on the PRT to the evidence he considered. The ALJ concluded that the limitations from Plaintiff's depression and post traumatic stress disorder cause no more than a slight deficit in his activities of daily living, have a moderate effect on maintaining social functioning, seldom affect concentration, persistence or pace, and have never caused episodes of deterioration

or decompensation.[1] [R. 264]. Although the ALJ thoroughly discussed the evidence concerning Plaintiff's mental impairment, he did not specifically discuss the evidence he relied upon in reaching the conclusions expressed on the form as required by *Washington v. Shalala*, 37 F.3d 1437, 1441-42 (10th Cir. 1994). If the ALJ based his PRT conclusions on the lack of credible evidence in the record demonstrating limitations in the various areas assessed on the PRT, he needed to say that. However, since he did not specify what evidence he relied on, the court has no way to determine whether the ALJ's conclusions were based on substantial evidence. Therefore, the case must be remanded.

The ALJ also failed to obtain the VA records as required by the remand order. [R. 294]. The court clearly instructed the Commissioner to obtain and evaluate the VA records related to Plaintiff's VA disability rating. Yet, the record does not contain those records or any explanation that such records do not exist or are not available.

There was apparently an attempt to obtain additional VA records. The ALJ requested Plaintiff's counsel to obtain and submit any additional evidence to be considered on remand. [R. 298]. It also appears that the ALJ was under the impression that the additional records had been obtained. At the beginning of the hearing on remand, the ALJ acknowledged that the case was remanded for the development of additional facts. He inquired of counsel whether there were any

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[1] These findings differ from the ones recorded on the PRT completed in conjunction with the earlier ALJ decision which was remanded in part because the ALJ failed to discuss the evidence he considered in completing the PRT form. *Compare* R. 33 *with* R. 275.

objections to any of the exhibits, and asked whether counsel intended to make an opening statement. He also made the following statement specifically directed to Plaintiff's counsel concerning the VA records:

> Let's see, Mr. McTighe, we have all the VA records and all those various records that they had asked for, so it looks like you did a fine job here in getting those for us, and we appreciate that.

[R. 383-84].

Plaintiff was represented by counsel throughout the administrative process. The ALJ requested Plaintiff to obtain the relevant records and specifically thanked counsel for his effort in that regard. In the usual case, these efforts may have been sufficient to discharge the ALJ's obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised. It is not sufficient here, however, since the court specifically directed the ALJ to obtain and evaluate the VA records.

That Plaintiff has received a 75% VA disability rating due to mental impairments strongly suggests the existence of a body of evidence relevant to Plaintiff's mental status which is not yet in the record. On the other hand, it may be that the records are so old that they are no longer available. On remand the Commissioner is required to ascertain what records are available concerning Plaintiff's VA disability rating; obtain those records; and evaluate them using the Social Security Administration criteria for disability determinations. If there are no additional records available, or the

records are not relevant to the instant determination, the Commissioner's decision must so indicate.

The Commissioner's decision is REVERSED and REMANDED for further proceedings consistent with this order.

SO ORDERED, this 30th Day of September, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOAN WILLIAMS-BLAND,
SSN: 440-56-4513,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-358-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 30th day of Sept., 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOAN WILLIAMS-BLAND,
SSN: 440-56-4513,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,[1]

DEFENDANT.

CASE NO. 97-CV-358-M

ENTERED ON DOCKET

DATE 10-1-98

ORDER

Plaintiff, Joan Williams-Bland, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[2] In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine

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[1] Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

[2] Plaintiff's October 18, 1994 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held October 25, 1995. By decision dated Dec 18, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 3, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born May 23, 1953 and was 42 years old at the time of the hearing. [R. 26]. She claims to have been unable to work since February 28, 1992 due to back, neck, shoulder, lower back and leg pain caused by scoliosis and headaches. [R. 30].

The ALJ determined that Plaintiff has severe impairments consisting of scoliosis and obesity but that she retains the residual functional capacity (RFC) to perform a wide range of light work with some limitations. He determined that Plaintiff's past relevant work (PRW) of data entry clerk did not require work related activities that were precluded by her RFC and found that Plaintiff was not disabled as defined by the Social Security Act. [R. 17]. The case was thus decided at step four of the five-step

evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).[3]

Plaintiff asserts the ALJ's RFC assessment is not supported by the evidence and his step four findings are incomplete. [Plaintiff's Brief, p. 2]. For the reasons discussed below, the Court affirms the decision of the Commissioner.

Residual Functional Capacity

Plaintiff claims a loose nexus was established between a clinically demonstrated impairment, scoliosis, and the symptom alleged, pain. She claims the ALJ failed to properly consider her subjective assertions concerning the severity of that pain. Plaintiff claims the ALJ "discredited the testimony and medical evidence that the Plaintiff's pain required her to alternate between sitting, standing, and laying down during the course of the day." The Court disagrees with that proposition.

The record contains several X-ray reports confirming that Plaintiff has scoliosis. [R. 224, 250, 364, 390, 415]. However, the reports regarding the degree of scoliosis range from "moderate" in 1975 and 1978 to "very severe dextroscoliosis" in 1980 and "mild" in 1984. [*Id.*, R. 202]. These X-rays were taken well before Plaintiff discontinued working in 1992 when she was "layed off" from her 18 year employment at Sun Oil. [R. 35]. Aside from the handwritten note of Dr. Davis, upon which Plaintiff relies for her treating physician's opinion of disability, the only allegations of back pain to medical care providers in the record are reports by a chiropractor and a few notes

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[3] The ALJ made an alternative step five finding which Plaintiff does not challenge. See *Berna v. Chater*, 101 F.3d 631 (10th Cir. 1996).

by W. H. Pue, M.D., a physician at Morton Health Center. Dr. Pue reported in February 1984, that Plaintiff complained of low back pain "[w]orse with weight gain" after a car accident in 1983. [R. 279]. She was enrolled in a clinical weight control program. *Id.* Low back pain noted in June 1984 by Dr. Pue related to Plaintiff's request for X-rays to be sent to Dr. Duncan who was to do a final report for her attorney. [R. 275].[4] The other note of back pain by Dr. Pue, dated July 24, 1989, reported low back discomfort intermittently for several years and mild scoliosis revealed by X-ray five years previously. [R. 202]. Upon physical examination, Dr. Pue found "deep tendon reflexes, strength testing, straight leg raising, gait unremarkable." He discussed walking for weight reduction with Plaintiff. *Id.*

The chiropractor, John A. Karr, wrote to an insurance carrier outlining Plaintiff's complaints of neck, upper back and shoulder pain, headaches and other problems caused by injuries sustained in a car accident in February 1993, as a back seat passenger. [R. 145-157]. Dr. Karr did not mention scoliosis in his notations or reports and referred to Plaintiff's back problems as "soft tissue injuries about the spine." [R. 146].

Plaintiff's general health care was provided by physicians at Morton Medical Center as far back as 1976. [R. 169-175]. Although scoliosis was found years before Plaintiff stopped working, the back pain complaints were tied to soft tissue injuries

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[4] Plaintiff's attorney submitted medical reports to the SSA regarding many physical problems not related to this claim, including dental records and records of a hysterectomy performed in 1987, but the medical records of Dr. Duncan were not included.

sustained in a car accident in 1983, weight gain and lumbar strain sustained in 1989. *Id.* Other than Dr. Davis's hand-written note, provided by Plaintiff to the ALJ at the hearing, there is nothing in the record to suggest that any of Plaintiff's physicians at Morton Medical Center ever considered her complaints of back pain serious enough to warrant further investigation or that treatment for complications related to scoliosis was recommended or required.

Plaintiff contends the ALJ improperly based his denial decision upon the consultative examination report of Steven Y.M. Lee, M.D., in effect, affording it more weight than the opinion of Plaintiff's treating physician, Dr. Davis. Dr. Lee wrote a report for the Disability Determination Unit after physical examination of Plaintiff on November 15, 1994. [R. 132-138]. He wrote: "mild and gentle scoliosis with the convexity pointing toward the right side in the lower thoracic spine area. There was no evidence of gross deformity of her back. Flexion, unimpaired by the scoliosis." [R. 133]. Dr. Lee found no significant evidence of impairment attributable to scoliosis in terms of functional ability. [R. 134].

The note Plaintiff contends outweighs Dr. Lee's findings and the other evidence in the record, is a one page, handwritten note from Dr. G.R. Davis on Morton Comprehensive Health Service, Inc. letterhead, dated October 20, 1995. [R. 424]. The note reads:

> Ms. Bland has sever Scholosis → ® and sever LBP (low back pain) which is increased by bending, standing, stooping and walking. Ms. Bland is not able to preform her usual work

> activities (Data Intry) at all. In my opinion, she is Totally Disabled and not able to work. I recommend that Ms. Bland have full evaluation by spinal cord specialists. [sic]

[R. 424].

Plaintiff states: "Dr. Davis', as the Plaintiff's treating physician had numerous opportunities to examine the Plaintiff and observe her pain while Dr. Lee's observations of the Plaintiff and her pain was limited to a short 15 to 30 minute evaluation." [Plaintiff's brief, p. 4]. She contends, for this reason, that the ALJ should have rejected Dr. Lee's findings in favor of the statement by Dr. Davis that she is not able to work. Yet, Plaintiff offers no explanation for Dr. Davis's failure to document any observations of complications due to scoliosis or complaints of pain caused by scoliosis in treatment records. Nor are there any clinical and laboratory diagnostic findings in the record that support Dr. Davis's conclusory opinion that Plaintiff is totally disabled and unable to work.

It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). However, a treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be

set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984). A treating physician's opinion that a claimant is totally disabled is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the [Commissioner]. *Castellano v. Secretary of Health and Human Services,* 26 F.3d 1027 (10th Cir. 1994).

The ALJ thoroughly discussed the weight accorded both reports. [R. 13]. The Court finds the ALJ's decision indicates that, contrary to Plaintiff's contention, he did consider all of the medical reports in the record in making his determination that Plaintiff retains the capacity to do a wide range of light work, with the limitations as set forth in his findings. [R. 17]. To the extent that Plaintiff challenges the weight accorded the evidence and urges the Court to reweigh the evidence, as set forth above, this is not the proper role of the Court. *Casias v. Secretary of Health & Human Services*, 933 F.2d 799 (10th Cir. 1991). The Court finds the ALJ's decision is supported by substantial evidence in the record.

Dr. Davis's handwritten note, presented to the ALJ at the hearing, is the only evidence, apart from Plaintiff's testimony at the hearing, that scoliosis caused Plaintiff such pain that it interfered with her ability to perform her job as a data entry clerk after she was "layed off" in 1992. Plaintiff is correct in asserting that the ALJ was required to consider her subjective assertions concerning the severity of her pain. *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13. Indeed, the decision of the ALJ indicates that he **did** consider Plaintiff's subjective assertions. After consideration, he

found Plaintiff's allegations of disabling pain not fully credible. The ALJ was entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ explained his reasons for discounting Plaintiff's pain allegations, discussed the objective medical evidence, including Plaintiff's failure to seek treatment for back pain while she was being treated for her other problems, Plaintiff's daily activities which included lifting grocery sacks of 18 pounds, and her demeanor at the hearing. [R. 15]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain and properly linked his credibility findings to the record, in accordance with the correct legal standards established by the Commissioner and the courts.

Past Relevant Work

Plaintiff contends that the ALJ did not "list the specific job requirements of each former job of the Plaintiff and did not compare the jobs in light of the Plaintiff's capabilities and impairments," and his finding that Plaintiff could perform the wide range of light work, including her past relevant work as a data entry clerk, was flawed.

The ALJ determined, at Step 4 of the sequential evaluation process, that Plaintiff could perform her past relevant work. In her Vocational Report, Plaintiff stated that she had to frequently lift trays of key punch cards weighing 20 to 25 pounds. [R. 91]. At the hearing, Plaintiff testified she lifted trays of 5 to 15 pounds

and performed "a lot of typing." [R. 36]. The Vocational Expert (VE) testified that the data entry job is usually classified as "sedentary" work. [R. 45].

The Tenth Circuit has held that "past relevant" work includes both (1) the actual functional demands of the past work actually performed by Plaintiff, and (2) the functional demands of Plaintiff's past work as it is normally performed in the national economy. *Andrade v. DHHS*, 985 F.2d 1045, 1050-51 (10th Cir. 1993). *See also* Social Security Ruling 82-61. In this case, the Vocational Expert ("VE") testified that Plaintiff's past work is normally performed at the "sedentary" exertional level, despite the fact that Plaintiff actually performed it at the "light" exertional level. At step four of the sequential evaluation process, the ALJ's duty of inquiry "requires the ALJ to review the claimant's [RFC] and the physical and mental demands of the work [she has] done in the past." *Henrie v. DHHS*, 13 F.3d 359, 361 (10th Cir. 1993) (citing 20 C.F.R. § 404.1520(e)). It is important to note, however, that the ALJ must inquire only about those past work demands "which have a bearing on the medically established limitations." Social Security Ruling 82-62.

Plaintiff argues that the ALJ in this case failed in his duty to inquire about the physical demands of Plaintiff's past relevant work as required by *Henrie*. The Court does not agree. In *Henrie,* the record was "devoid of evidence" regarding the demands of plaintiff's past job. *Henrie*, 13 F.3d at 361. Unlike *Henrie*, the record in this case is not "devoid" of evidence regarding the demands of Plaintiff's work. Plaintiff's Vocational Report contains a detailed description of the exertional demands of her past work. Plaintiff also provided some testimony regarding the nature of her previous

work. *See Smith v. Chater*, 62 F.3d 1429, 1995 WL 465814, *3 (10th Cir. Aug. 8, 1995) (recognizing that documentary and testimonial evidence regarding demands of past work can be sufficient); and Social Security Ruling 82-61 (recognizing that a properly completed Vocational Report may be sufficient to provide information about past work). The ALJ found that Plaintiff's past work, as she actually performed it, was light work that did not require performance of any of the activities he found were restricted by her RFC. He also noted that data entry work, as normally performed in the national economy, is sedentary, according to the VE's testimony.

When asked to explain what limitations prevented her from returning to work Plaintiff's only assertion was the limitation occasioned by pain. [R. 36-37]. The ALJ extensively and appropriately analyzed the pain asserted by Plaintiff and conducted the appropriate legal analysis with regard to that assertion, and found it not credible. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). Based upon that detailed analysis, the ALJ rejected Plaintiff's assertion of disabling pain and set forth specific reasons for that rejection. Based upon that determination and the Plaintiff's description of her work as a data entry clerk, as well as the VE's testimony regarding the physical demands of the job, both as Plaintiff actually performed it and as it is normally performed, this Court is convinced that there is "enough information" on Plaintiff's PRW and her RFC to conclude the ALJ's decision that Plaintiff could return to that work is supported by substantial evidence.

The Court also finds there is sufficient evidence in the record establishing that, even with Plaintiff's current impairments, there are a significant number of other jobs in the national economy which she is capable of performing. That is, there is sufficient evidence in the record for the Commissioner to carry his burden at step five of the sequential evaluation process. The ALJ described the following hypothetical person to the vocational expert: (1) 42 years old; (2) twelfth grade education; (3) good ability to read, write and use numbers; (4) can perform sedentary or light work; (5) has nonexertional limitations of only occasional bending, stooping, crouching, climbing; (6) restrictions on repetitive overhead reaching, repetitive extreme flexion and extension, twisting of the neck; and, (7) has mild to moderate pain. [R. 47]. The Court finds that this hypothetical adequately describes Plaintiff's impairments. With respect to this hypothetical person, the vocational expert identified four different jobs as a representative sample of jobs available in the local and national economy that Plaintiff could perform. This is sufficient to carry the Secretary's burden at step five.

Conclusion

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retained the capacity to perform her past relevant work or that, in the alternative, there are a significant number of jobs available in the national economy that Plaintiff could perform even if she could not return to her past work. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled.

Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 30th day of Sept., 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRANCE W. SARGENT,

Plaintiff,

v.

PATRICK BALLARD, individually and as Sheriff of the Washington County Jail,

Defendant.

Case No. 95-CV-331-J

ORDER[1/]

Now before the Court is Defendant's Motion for Reconsideration. [Doc. No. 49]. For the reasons discussed below, the Court **GRANTS** Defendant's motion to reconsider and dismisses the remaining claims in this lawsuit.

Defendant previously filed his first motion for summary judgment on July 17, 1995. That motion was granted as to all claims asserted by Plaintiff, except for one. The Court denied summary judgment as to Plaintiff's claim that Defendant violated the United States Constitution by denying him doctor-prescribed medication. [Doc. No. 18]. Defendant filed a second motion for summary judgment on November 26, 1996. This second motion was directed solely to the remaining denial of medication claim. The Court denied Defendant's second motion for substantially the same reasons that the Court denied Defendant's first motion for summary judgment. [Doc. No. 45]. Defendant has now filed a motion requesting that the Court reconsider its ruling on Defendant's second motion for summary judgment.

[1/] This order is entered pursuant to the consent of the parties and 28 U.S.C. § 636.

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The Court twice denied Defendant's request for summary judgment on Plaintiff's denial of medication claim because the record before the Court at the time both of those motions were decided demonstrated that factual issues existed regarding (1) whether Plaintiff was denied doctor-prescribed medication for a serious medical condition after seven days, and (2) whether Defendant was responsible for establishing a policy that medication be given to prisoners for only a seven day period.

With his motion to reconsider, Defendant submitted new evidentiary materials that were not before the Court when the prior motions for summary judgment were decided. The evidentiary materials now submitted by Defendant dispel any factual issues regarding the medication policy of the Washington County Jail.

Plaintiff alleges that he was denied Tylenol. The undisputed facts establish the following. Washington County dispenses over the counter medications, such as Tylenol, when the prison doctor determines that the medication is medically necessary. The prison doctor visits the jail once every seven days. Because medical conditions requiring treatment with over the counter medications are not life-threatening and often resolve within several days, over the counter medications must be reordered or renewed by the doctor at each visit. Thus, an inmate must re-request over the counter medication from the prison doctor each seven days when the doctor visits the prison. This policy does not evidence the deliberate indifference to a prisoner's medical needs required by Estelle v. Gamble, 429 U.S. 97 (1976) and Bell v. Wolfish, 441 U.S. 520 (1979).

Defendant's motion for reconsideration is granted. The Court hereby reconsiders its prior ruling on Defendant's second motion for summary judgment and finds that Defendant's second motion for summary judgment should be granted in light of the new evidence submitted with Defendant's motion to reconsider. Plaintiff's denial of medication claim is, therefore, dismissed. The clerk of the court shall show this action as terminated.

IT IS SO ORDERED.

Dated this 30 day of September 1998.

Sam A. Joyner
United States Magistrate Judge